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IN THE

Supreme Court of the United States

October Term, 1938

No. 810

GEORGE W. O'MALLEY, Individually and as Collector of Internal Revenue,

Appellant,

vs.

JOSEPH W. WOODROUGH and ELLA B. WOODROUGH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Hon. T. C. Munger, District Judge

BRIEF FOR APPELLEES

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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 18th St.

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BRIEF FOR APPELLEES

OPINION BELOW

The Appellant, George W. O'Malley, Individually and as Collector of Internal Revenue of the United States for the District of Nebraska, brought this appeal from a Judgment of the United States District Court for the District of Nebraska, Omaha Division, entered March 18, 1939, against said Collector of Internal Revenue, in favor of the Appellees, Judge Joseph W. Woodrough and his wife, Ella B. Woodrough, for the recovery of a deficiency assessment, paid under protest, in the sum of $660.02.

The Judgment followed an Order of the Court overruling a Motion by said George W. O'Malley, Appellant, to dismiss Appellees' Petition, and the refusal of the Appellant to plead further.

Not any Opinion was entered, but the Court's order, denying Appellant's Motion to Dismiss the Petition, gives the bases of the Court's decision.

JURISDICTION

Appellant claims jurisdiction herein rests upon Section 2 of the Act of August 24, 1937, C. 754, 50 Stat. 751.

QUESTIONS PRESENTED

The question presented is as to the constitutionality of Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which provides, to the extent here material, as follows:

> "In the case of Presidents of the United States and Judges of Courts of the United States, taking office after June 6, 1932, the compensation received as such shall be included in gross income and all Acts fixing the compensation of such Presidents and Judges are hereby amended accordingly."

It is contended by Appellees that said Section 22 (a) is invalid and unconstitutional for the following reasons:

(a) It violates the rule and principle implicit in Articles I, II, and III of the Constitution providing for three separate departments of Government, each department to be independent of the other departments, in that it attempts to subject the compensation of Judges to the taxing power of the legislative department, thereby giving the coercive control to the legislative department.

(b) It violates Section 1 of Article III of the Constitution, in that it diminishes the compensation of Judges during their continuance in office.

(c) Irrespective of (a) and (b) contentions, supra—it violates Section 1 of Article III of the Constitution, in that, if applicable, the compensation of Judges subjected thereto would not be—

(1) A fixed compensation, or

(2) A fixed compensation payable at stated times.

(d) It violates the Fifth Amendment, in that it unreasonably and arbitrarily seeks to classify Judges of equal rank and dignity, doing the same identical work, and, absent the attempted unlawful classification, receiving the same stipulated compensation, under Title 28, Sec. 213, U. S. C., and which attempted classification is premised solely on the chronological accidents of appointments, and without there being any character of difference or distinction or basis whatsoever to justify such patently inequitable classification.

The District Court found said Section 22 (a) of the Revenue Act of 1936 to be invalid because repugnant to Article I, Article II and Article III of the Constitution of the United States, and particularly Section 1 of Article III, and repugnant to Article V of the Amendments to the Constitution of the United States.

The Appellant contends that said Section 22 (a) of the Revenue Act of 1936 is a valid and constitutional amendatory law to Sec. 213, Title 28, U. S. C., and that, in consequence, the judgment of the District Court in favor of the Appellees and against the Appellant should be reversed with directions to enter judgment in the premises for a dismissal of the Appellees' stated cause of action.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The Constitutional Provisions involved are Article I, Article II and Article III, of the Constitution, and Article V of the Amendments to the Constitution of the United States, and particularly Section 1 of Article III of the Constitution.

Articles I, II and III of the Constitution imply the substantive principle of the Separation of the three departments of the National Government.

Article III, Section 1 of the Constitution provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Article V of the Amendments to the Constitution, to the extent here material, provides as follows:

> "No person shall * * * be deprived of life, liberty or property without due process of law; * * *."

Statutes

The Statute involved is Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which provides as follows:

> "(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from

professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

"In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

The Act of Congress fixing the compensation of Federal Judges, Title 28, Sec. 213, U. S. C., provides as follows:

"Par. 213. (Judicial Code, section 118, amended) Circuit judges. There shall be in the sixth, seventh, and tenth circuits, respectively, four circuit judges; and in the second and eighth circuits, respectively, five circuit judges; and in each of the other circuits three circuit judges; to be appointed by the President, by and with the advice and consent of the Senate. Each circuit judge shall receive a salary of $12,500 a year, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law. Nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided by other sections of the Judicial Code. (As amended Dec. 13, 1926, c. 6, Par. 1, 44 Stat. 919; Feb. 28, 1929, c. 363, Par. 2, 45 Stat. 1347.)"

STATEMENT

The facts relevant to the question here presented may be stated as follows:

Joseph W. Woodrough was appointed Judge of the United States District Court for the District of Nebraska, Omaha Division, prior to June 6, 1932. On April 12, 1933, he was appointed a Judge of the United States Circuit Court of Appeals for the Eighth Circuit. He took the oath and qualified as such Circuit Judge on May 1, 1933, and has since continued as a Judge of the Circuit Court of Appeals.

Prior to the 1st of May, 1933, as Judge of the United States District Court, Judge Woodrough received a salary of $10,000 per year; and, since the 1st day of May, 1933, as Judge of the United States Circuit Court of Appeals has received—"* * * a salary of $12,500.00 a year, payable monthly," as provided under Section 213, Title 28, U. S. C., *supra.*

On March 15, 1937, Judge Woodrough and wife filed a joint income tax return for the calendar year 1936 with George W. O'Malley, Collector of Internal Revenue, at Omaha, Nebraska. This return showed the total income of Judge Woodrough and wife, including in the gross return the $12,500.00 compensation for the year 1936, received by the Judge as Judge of the United States Circuit Court of Appeals. The said $12,500.00 judicial compensation was claimed to be not subject to the Federal Income Tax.

Thereafter, the Internal Revenue Department made an examination of said return and on the 8th day of October, 1937, proposed the assessment of a deficiency in the sum of $631.60 for the year of 1936. The proposed assessment of deficiency reflected the inclusion of the said

1936 $12,500.00 judicial compensation as a part of the gross income of Judge Woodrough, and such inclusion was based on the authority of the aforequoted Section 22 (a) of the Revenue Act of 1936.

Judge Woodrough and wife took proper steps to protect their rights, and, under protest, paid the deficiency assessed, together with interest, and thereafter filed a claim for refund, which was duly rejected.

June 17, 1938, Judge Woodrough and wife filed a Petition in the District Court of the United States, for the District of Nebraska, Omaha Division, against George W. O'Malley, individually and as Collector of Internal Revenue, for the recovery of $660.02, the amount of said deficiency paid as aforestated, with interest from December 15, 1937, and judgment was recovered for said amount March 18, 1939.

In said Petition, after setting down the chronology of facts afore-indicated, it was contended, *inter alia*—

(a) That Judge Woodrough received "* * * a salary of $12,500 per year, payable monthly * * *" as a Circuit Court of Appeals Judge, under and pursuant to Paragraph 213, Title 28 of the United States Code, *supra*.

(b) That Article III, Section 1 of the Constitution of the United States provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

(c) That the aforequoted Section 22 (a) of the Revenue Act of 1936, relied upon by the Collector of Internal Revenue in enforcing the said deficiency assessment of $631.60 against Plaintiffs, Judge Woodrough and wife, is invalid and unconstitutional, because repugnant to the provisions of Article III, Section 1 of the Constitution of the United States, for the following reasons:

1. The enforcement of said provision of Section 22 (a) of the Revenue Act of 1936 would create a situation whereby the compensation of the Judges of the United States Courts, including that of the Plaintiff, Judge Woodrough, would no longer be a fixed compensation payable at stated times, and would be subject to fluctuations, depending upon Judge Woodrough's other income, credits, deductions, and personal exemptions.

2. The enforcement of said provision of Section 22 (a) of the Revenue Act of 1936 would create an anomalous situation, whereby few Judges appointed subsequent to June 6, 1932, would receive the same compensation, and not any of such Judges would receive the compensation provided for Judges appointed prior to June 6, 1932, all contrary to the purpose and spirit of Article III, Section 1 of the Constitution of the United States.

3. Said Section 22 (a) of the Revenue Act of 1932 was repealed by the enactment of the Revenue Act of 1934, and the Revenue Acts of 1934 and 1936 were enacted subsequent to April 12, 1933, the date of Judge Woodrough's appointment as a Circuit Court of Appeals Judge, and enforcement of said Revenue Act of 1936 would diminish the compensation of Judge Woodrough during his continuance in office as a Judge of the Circuit Court of Appeals, in violation of Article III, Section 1 of the Constitution of the United States.

4. The Revenue Acts of 1934 and 1936, in their respective composite effects, both increased in the upper brackets, Income Tax rates; and if, when and as the Appellee, Judge Woodrough, or any other Judge appointed prior to the year 1934 or 1936, in their respective aggregate incomes, received sufficient gross revenue, their respective judicial compensations would be further diminished under the provisions of said Acts of 1934 and 1936, over and above the diminution incident to an application of the Act of 1932.

(d) That the aforestated Section 22 (a) of the Revenue Act of 1936, is invalid and unconstitutional because in violation of the limitations which are implicit in the purpose, spirit and letter of Article I, Article II and Article III of the Constitution of the United States, which create the three separate and independent Departments of the Government, in that said Section 22 (a) interferes with the independence of the Judicial Department and subjects the Judicial Department to the control and coercive influence of the Legislative Department.

(e) That the aforestated Section 22 (a) of the Revenue Act of 1936, is invalid and unconstitutional because repugnant to Article Five of the Amendments to the Constitution of the United States, in that there not having been in existence during the year 1936, and there not now being, a valid law of the United States under which a tax on the compensation of Appellee, Judge Woodrough, as Judge of the Circuit Court of Appeals of the United States, could be assessed or imposed, the subjecting of the 1936 compensation of Judge Woodrough to the said Section 22 (a) of the Revenue Act of 1936 would be a taking of the property of the Appellee, Judge Woodrough, arbitrarily and capriciously and without due process of law.

SUMMARY OF ARGUMENT

I.

Section 1 of Article III of the Constitution expressly forbids the diminution of the compensation of Federal Judges. No exception whatsoever is expressed or implied, with the result that the inhibition is against a reduction, in manner or form, or directly or indirectly.

Our country came into existence as a revolt against tyranny in Government, particularly the abuse of the taxation powers; and, convinced that the security of any Government is measured by the independence of its Judiciary, the makers of our Constitution intended by Section 1 of Article III that the tenure of Federal Judges should be during good behavior and their compensation during their continuance in office should not be diminished in manner or form.

The definite objective was to carry out, as to the Judiciary, the purpose implicit in Articles I, II and III of the Constitution, to establish, and render independent each of the other, three separate governmental departments, the Executive, Legislative and Judicial; and because of the inherently defenseless status of the Judicial Department, to insure its complete and unqualified independence as to the tenure and compensation of its Judges. This purpose to meticulously and comprehensively protect the Judiciary followed the concensus reflected by statements of Alexander Hamilton and Madison in The Federalist. In Number 78 Hamilton said, after enlarging on the powers of the other branches of Government:

> "This simple view of the matter suggests several important consequences: It proves incontestably that the judiciary is beyond comparison the weakest

of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

(Selected Essays on Constitutional Law, Vol. 4, p. 431.)

The same thought was expressed by Chief Justice Hughes in his Address before the joint meeting of the House and Senate, celebrating the One Hundred and Fiftieth Anniversary of the First Meeting of Congress, when he stated:

"You, not we, have the purse and the sword."

(American Bar Association Journal, Vol. XXV, No. 4, p. 288.)

Hamilton, in The Federalist, Number 79, said:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. * * * In the general course of human nature, the power over a man's subsistence amounts to a power over his will."

It was in the light of these principles that the Makers of the Constitution also had in mind the unlimited discretion as to the quantum of a tax which may be imposed, where the power to tax obtains, and the resulting coercive power over all subject to a taxing power.

And, in consequence, the protection of the compensation of Judges was made absolutely without qualification whatsoever.

The Declaration of Independence recited, *inter alia*, "He (King George III) has made Judges dependent on his Will alone for the tenure of their offices and the amount and payment of their salaries."

In the light of these facts of history, it was definitely in the minds of the makers of our Constitution to provide

in Section 1 of Article III a more exact and comprehensive protection of the Judiciary, particularly as to compensation, than obtained in other countries or in the several states.

In evolving Section 1 of Article III the makers of the Constitution had definitely in mind the even then common use of the mechanism of income taxation for the governmental raising of funds; and, with such information in mind, the deliberate refraining from expressing any exception or qualification to the inhibition of a diminishing of compensation of Judges, demonstrates the definite purpose that not any diminution, however characterized as non-discriminatory or indirect, should be permitted.

The protecting of the compensation of Judges was not to benefit or advantage the Judges, but to permanently insure to the people a wholly independent forum for the protection of their rights. This objective was aptly described by Chief Justice Marshall in the course of the Debates of the Virginia State Convention of 1829-30 (616, 619), in the following language:

> "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he (a Judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? * * * I have always thought, from my earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

The Makers of the Constitution believed—and fashioned Article III, Section 1 in such light—that the security

of any nation is measured in the last analysis by the independence of its Judiciary.

The foregoing historical tenets were meticulouly rehearsed in *Evans v. Gore,* 253 U. S. 245, 64 L. Ed. 887, and the independence of the Judiciary—and necessarily the consequent freedom from taxation of its compensation—was proclaimed to be the intent of the Makers of the Constitution, and to be the law of the land.

II.

It is not a tenable position that the source of the income may be ignored in an attempted application of an Income Tax to Federal Judicial salaries, in the face of a positive prohibition by Section 1, Article III of the National Constitution against the diminution of such Salary Income.

III.

Assuming, arguendo, that the subjecting of the compensations of Federal Judges to an income tax law would not contravene the provision of Section 1, Article III of the Constitution, providing compensation of Judges "* * * shall not be diminished during their continuance in office," nevertheless Section 22 (a) of the Revenue Act of 1936 violates other express requirements of said Section 1, Article III in the following particulars. Section 1 of Article III, aside from and in addition to inhibiting any diminution of compensation, requires—

(a) That a fixed compensation be provided for Federal Judges, and

(b) That a fixed compensation for Federal Judges be paid at stated times.

Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936, purporting, by the language "and all Acts fixing

the compensation of such Presidents and Judges are hereby amended accordingly," to amend the statutes fixing the compensation of Judges of the United States Courts (Title 28, Sec. 213, U. S. C.) does not provide for a fixed, definite and certain compensation payable at stated times, required as aforestated by Section 1 of Article III of the Constitution, and is, therefore, void and cannot be held to be a valid Amendatory Act amending the Salary Act.

In the case of *Miles v. Graham,* 268 U. S. 501, 69 L. Ed. 1067, the rule was enunciated that it is the duty of Congress "definitely to declare what sum shall be received by each Judge and the times for payment." The section involved does not purport to reduce salaries of Judges later to be appointed by any fixed amount, but purports to recapture, at later dates, from their salaries varying amounts—not in fact determinable until after the expiration of the calendar year in which the salary payments were received.

But under the operations of Section 22 (a) of the 1936 Revenue Act a Judge's compensation would neither be a fixed compensation nor a compensation payable at stated times. This would be true because, after the end of a calendar year, during which he would have received monthly judicial compensation payments, when, pursuant to the requirements of the statute under discussion, a Judge made an Income Tax return, he would include all of his income, and deduct therefrom credits, deductions and personal exemptions. The cumulative effect of this mechanism would be to retroactively disarrange and change the quantum of the monthly payments theretofore received; and, as a result of which, the Judge would not have received "a compensation," that is, payments of a fixed compensation; and would not have received pay-

ments of a fixed compensation "at stated times." (*Miles v. Graham, supra.*)

It is to be noted in this respect that the specific and composite effects of the variables, which are integral parts of the income tax mechanism,—credits, deductions and exemptions,—and which would preclude a Federal Judge from receiving a fixed compensation at stated periods during any year, cannot be definitely foreseen or anticipated. In other words, what ultimate *net* compensation may be received under the application of such an income revenue act cannot be known or determined until after the end of a calendar—taxing—year, and the ultimate application of the various incident variables.

For instance, either a death or a marriage of a Federal Judge would change his ultimate net compensation in the premises, as would also a birth in the family, or a loss of property during the year. Of course, the legal prerogative of Congress to impose a retroactive income tax also conclusively demonstrates, and illustrates, the definite uncertainty of the quantum of a Federal Judge's salary, if subject to an income tax.

The sustaining of the contention here set forth with reference to the requirement of a fixed compensation payable at stated times, would require an affirmance of the judgment below, irrespective of the existence or non-existence of the *Evans v. Gore* rule.

IV.

Assuming, again arguendo, that the subjecting of the compensation of Judges to an income tax law would not contravene the provision of Section 1 of Article III of the Constitution forbidding diminution of Judges' Compensation;

And, assuming, arguendo, that the subjecting of the Compensation of Judges to an income tax would not contravene the provisions of Section 1, Article III of the Constitution requiring Judges' compensations to be a fixed compensation payable at stated times;

Nevertheless Section 22 (a) of the Revenue Act of 1936 is unconstitutional, because of unlawful discrimination in the classification of Judges subjected to the Act, in violation of Article V of the Amendments to the Constitution, inhibiting the taking of property without due process.

The arbitrary classification made by the Act, namely, the inclusion under the purview of the Act of Judges appointed after June 6, 1932, and the exemption, by omission, of Judges fortuitously theretofore appointed, does not reflect and could not reflect any difference of any character whatsoever as to the two classes of Judges, so differently dealt with. This is necessarily true as, for instance, the Circuit Courts of Appeal Judges—the same reasoning will apply to District Judges, and to Judges of the Supreme Court—are all of equal rank, do identical work, and their stipulated compensations are alike. (Title 28, Sec. 213, U. S. C.)

No difference or distinction obtains among the Judges, other than in the chronology of their appointments.

The attempted classification, therefore, of Judges, according to the dates of their appointments, is not only wholly without support in substance, and violative of all legal conceptions of fair play, but, the incident possible revenue being negligible, is an attempted subversion of established constitutional provisions and concepts (*U. S. v. Butler,* 297 U. S. 1, 80 L. Ed. 477), and an obvious attempt to evade the law of the land reflected by the opin-

ions of the United States Supreme Court, particularly those of *Evans v. Gore* and *Miles v. Graham, supra.*

For the reasons here stated, Section 22 (a) of the Revenue Act of 1936 is void and unconstitutional, as premised on an unreasonable classification, in violation of the provision of Article V of the Amendments to the Constitution, inhibiting the taking of property without due process (*Heiner v. Donnan*, 285 U. S. 312, 76 L. Ed. 772).

In consequence there is not any other issue properly before the Court. That is to say, the contention here submitted, if sustained by the Court, would also terminate this law suit in an affirmance of the judgment in favor of Judge Woodrough, irrespective of the existence or non-existence of the *Evans v. Gore* rule, and irrespective of the failure of the 1936 revenue act to provide for judges a fixed compensation, payable at stated times.

ARGUMENT

Preface

The sole question involved is the validity of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648). This Section contains the following:

> "In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

The Honorable T. C. Munger, Judge of the District Court for the District of Nebraska, Lincoln Division, held this Section of the Revenue Act invalid for the reason that it violated Section 1, Article III, of the Constitution

of the United States, also Articles I, II, and III thereof, and the Fifth Amendment to the Constitution.

Section 1 of Article III provides, in part, as follows:

> "The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

The question involved, therefore, is whether the salary of Judge Woodrough, who took office in the year 1933, is subject to the 1936 Federal Income Tax.

It is submitted:

That Such a Tax Levied on and Collected Out of the Compensation of any Constitutional Judge of a Court of the United States Serves to Diminish Such Judge's Compensation and Is Violative of the Express Provisions of Section 1 of Article III of the Constitution of the United States.

Scope of Argument

In refutation of the argument presented by the Appellant herein, we propose to demonstrate:

I. The basis and philosophy of *Evans v. Gore* are wholly unimpaired and as vital and vibrant today as at the adoption of Section 1, Article III of the National Constitution, interpreted and applied by *Evans v. Gore.*

This is demonstrated by:

A. The prevalence of income taxes at the date of the adoption of Section 1, Article III of the National Constitution, and the signal failure of the framers of the Constitution to except in-

come taxes from the inhibition of the diminution of the compensation of the Federal Judiciary.

B. The consequent breadth of the impulse and the intent to assure the independence of the Judiciary, and its portrayal in the implicit prohibition of the taxation of the Judiciary by separation of the National Government into three departments.

C. Conclusions reached by State Courts, with respect to like Constitutional provisions.

D. The fact that if the vulnerability of the Federal Judiciary to a Federal Income Tax were once established, the indisputable susceptibility of the Federal Judiciary to classification, *qua* judiciary, would permit such taxation to be exerted to any degree, and thereby encompass the Judicial department's subservience to and dependence upon the other two departments of the National Government, and the presently allegedly light burden of such income tax imposition is no measure of the sacrifice of the principle of independence.

II. The Source of the Income of the Federal Judiciary cannot be ignored in an attempted assessment of an Income Tax thereon, in the face of Section 1, Article III of the National Constitution, protecting it from diminution.

III. Section 22 (a), of the Revenue Acts of 1932, 1934 and 1936, in its aspect as an amendment to existing Judicial Salary Acts, is void in failing to provide a fixed compensation, at stated times, for the members of the Federal Judiciary, contrary to Section 1 of Article III of the National Constitution.

A. Section 22 (a), of the Revenue Acts of 1932, 1934 and 1936, was passed as, and intended to be, a diminution of the compensation of the Federal Judiciary, and is not a mere applying of the tax obligation to the Federal Judiciary as one of the ordinary duties of citizens.

B. Such amendment, by reason of the variables inherent in the application of the Income Tax, would create disproportionate, indefinite and dissimilar compensations for the various members of the Federal Judiciary.

C. Such amendment would create invidious distinctions as between members of any given branch of the Federal Judiciary and thereby produce an unthinkable and reprehensible disparity between Judges of the same rank, dignity and jurisdiction.

IV. Section 22 (a), of the Revenue Acts of 1932, 1934 and 1936, in its aspect as an amendment to Revenue Acts relating to income taxes, is void in its application to members of the Federal Judiciary because it properly creates a classification of Federal Judges as such, but improperly creates a classification as between various Federal Judges of the same rank,—those appointed before and those appointed after June 6, 1932,—without any rational distinction therefor, so far as the imposition of taxes upon such class is concerned.

I.

THE BASIS AND PHILOSOPHY OF EVANS V. GORE ARE WHOLLY UNIMPAIRED AND AS VITAL AND VIBRANT TODAY AS AT THE ADOPTION OF SECTION 1, ARTICLE III OF THE NATIONAL CONSTITUTION, INTERPRETED AND APPLIED BY EVANS V. GORE.

A.

The Prevalence of Income Taxes at the Date of the Adoption of Section 1, Article III of the National Constitution, and the Signal Failure of the Framers of the Constitution to Except Income Taxes From the Inhibition of the Diminution of the Compensation of the Federal Judiciary.

At the outset it should be observed—

Historical Background

The historical background of the use of income taxes, proves a definite purpose not to exclude diminution of the compensation of Judges from the prohibition of Section 1, Article III of the National Constitution by resort to the Income Tax mechanism.

That the Makers of the Constitution clearly and definitely intended not to exclude from the purview of Section 1 of Article III the diminution of Judges' compensation through the application of Income Tax laws, is demonstrated by the following chronology.

Crude, though substantive, Income Tax methods of raising public revenues were utilized as far back as the Middle Ages; and, prior to the adoption of our Constitution, several of the States as such, and theretofore as Colonies, had utilized this revenue-providing mechanism.

There has been some discussion as to the exact descriptive term to be applied to the Colonial Income Tax mechanism, that is, whether they should be described as Faculty Taxes or Income Taxes. However, as stated by one of the authors (Kossuth Kent Kennan, "Income Taxation," 1910, p. 205), this is merely a matter of nomenclature, because the imposing of governmental revenue exactions upon incomes unquestionably obtained.

Papal Income Taxes

In his article, "Early Assessments for Papal Taxation of English Clerical Income," William E. Lunt records the earliest imposition of Income Taxes as a Papal Income Tax, imposed in the year 1199 to finance aid for the Holy Land Crusades. The tax was 1/40th of the yearly income of all Priests, Bishops, etc. This levy lasted until the year 1201. The author indicated that, in the years 1215, 1229, 1238, and intermittently until 1252, the various Popes financed Vatican activities by levying similar taxes. (Annual Report of the American Historical Association for the year 1937.)

Middle Ages—Commercial Cities

In his "The Income Tax" (1914) at page 45, Edwin R. A. Seligman records the imposition of taxation of incomes in the Italian Cities which had become centers of industry. The author, at page 46, speaks of the action in Florence, as follows:

> "The reason, however, why the *estimo* gave way to the *catasto* in 1451, or, in other words, the reason why the property tax changed into an income tax, was the fact that in a large commercial or industrial centre, where the mass of wealth was being accumulated out of the earnings of industry and commerce rather than, as elsewhere, out of the rent of land,

property was no longer so good an index of faculty as income. The democracy of Florence was as much impressed by the business earnings of the large merchant princes as are the modern democracies of Europe or America influenced by the gains of the trust magnates and of the financial kings. The democratic movement of the medieval Italian republics is therefore responsible for the evolution of the property tax into an income tax. The *catasto* was a real income tax, and shortly afterward it was made progressive under the name of *scala.*"

France

The invoking of the Income Tax in France is described by Seligman (at page 50), as follows:

"At the close of the seventeenth century the fiscal situation of France had become so bad that increased revenue was imperatively necessary. France had by this time become a great industrial and commercial nation, and was far in advance not only of England, but of the adjoining countries. Accordingly, the government now thought that it would be possible to lay tribute upon these newer forms of wealth. After the elaboration of plans of tax reform in the shape of a general income tax by publicists like Vauban and Boisguilbert, the Government decided to make the attempt. At first, however, it contented itself with introducing in 1697 a classified poll tax known as the *capitation* or *capitation graduee.* This was a kind of class tax; that is to say, the tax was imposed upon individuals according to their social status, the rate for all members of the same class being identical. There were twenty-two classes, the tax ranging from one livre to two thousand livres. The capitation was suppressed in 1698, but re-established in 1701, and it was then gradually transformed into a tax on individual incomes, members of the same class now being rated differently. By 1705 the capitation, although still so called, had virtually be-

come an income tax in three-fourths of the country, and lasted throughout the eighteenth century."

England

Seligman (at page 48) described the early English effort to broaden its tax mechanism, as follows:

> "The English tax at the close of the seventeenth century, like all of its medieval predecessors, was a combination of property and produce taxes. In the case of land, the tax was assessed on the rack rent or yearly value in 1692 at the rate of four shillings for every pound of rent."

After detailing the property tax mechanism of 1692, the author proceeded as follows:

* * * * *

> "Finally, in the case of 'any person exercising any publick office or employment of profit,' the tax was assessed directly upon these salaries at the rate of four shillings for every pound of salary.
>
> "The tax, therefore, was a property tax, except that the value of lands was reached through their rent, and with the further exception that property in public offices was taxed through the salaries themselves."

Mr. Seligman indicates (at pp. 72, *et seq.*) that the first English Income Tax, of the present day form and substance, was introduced in Parliament by Pitt, December 8, 1799, and, after sustained debate, enacted into law. However, for years prior to the formal action taken, and climaxing under the financial pressure of the French-English War of 1798, the necessity for reaching income, to assist in defraying Government expense, had been under discussion and consideration by English statesmen and economists.

With all of these facts, and with the principles involved, the American statesmen and economists, who ultimately drafted our Constitution in 1789, were entirely familiar.

Colonies of the United States

All authorities agree that American Colonies—and later as States—taxed incomes, but, as indicated, some of the authors, as Professor Seligman, choose to describe such taxes as Faculty Taxes, rather than Income Taxes.

Of course, the word "faculty" in its use with reference to taxation, connotes the meaning of "ability to pay." The usual reference, however, to the taxes so imposed by the Colonies has been "Income Taxes."

The substantive difference between the Income Taxes imposed by the Colonies and the Income Taxes of the present day obtain in the fact that the early Income Taxes, such as imposed by the Colonies of the United States, and the commercial cities of the Middle Ages, approximated the incomes, whereas, under the present day Income Tax mechanism, the tax is exactly ascertained and ultimately imposed on individual net incomes.

Speaking of this distinction without a difference, Delos O. Kinsman, in his Article "The Income Tax in Commonwealths of the United States" (Publications of the American Economic Association, 3rd Series, Volume 4 (1903)), said:

> "The essential point in which the faculty tax differed from the later income tax was in the method of assessment. As a rule the faculty tax was an estimated tax, whereas the income tax proper has been, in theory at least, a tax upon the actual income of individuals. The most superficial examination re-

veals the fact that the faculty tax underwent an important evolution in the colonial period, developing from a vague, indefinite effort to tax personal ability to a definite, well-defined tax directed against income from wages and profits."

Mr. Kinsman in the same article, described the Income Taxes imposed by the Colonies, as follows:

"The history of the income tax in the commonwealths of the United States covers a period of more than two hundred and fifty years. In this monograph it is the purpose to study in detail the income tax in each of the commonwealths employing it, and to present the conclusions which these facts seem to warrant.

"The history may be divided into two periods. The first, that of the 'faculty' tax, closed about 1825. It was characterized by a loose method of determining the taxpayer's ability, the levy being made upon an estimated or assumed income of the individual. The second period, that of the income tax proper, continuing to the present time, has become characterized by the attempt to assess and tax the exact income of the individual. Our study is concerned principally with the second period. But as a number of the principles employed in the second period were introduced in the first, it will be necessary, by way of introduction, to examine this earlier period."

Speaking to the same point, Kossuth Kent Kennan, in his "Income Taxation" (1910), at page 205, said:

"The whole question is one of nomenclature and could perhaps be settled by calling the faculty taxes partial income taxes. In any case, it is quite evident that most of the state income taxes thus far levied were based upon, and found their beginning in, the faculty taxes of colonial times."

The Colonies—later as States—employing, to different degrees and in somewhat different forms, Income Taxes, under the nomenclature of "Faculty Taxes" were—Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, New York, New Jersey, Delaware, Maryland, Pennsylvania, Virginia, South Carolina.

Comprehensive reviews of the imposition by the Colonies of Income Taxes appear in Kossuth Kent Kennan's "Income Taxation" at pages 203, *et seq.*, and in Edwin R. A. Seligman's "The Income Tax", at pages 367, *et seq.*

Chief Justice Fuller, in *Pollock v. Farmers Loan and Trust Company*, 157 U. S. 429, 559, 39 L. Ed. 759, 811, in the following statements, indicated the wide familiarity of the members of the Constitutional Body with governmental problems, and with the common governmental use of the income tax mechanism "prior to the adoption of the Constitution":

> "We must remember that the fifty-five members of the constitutional convention were men of great sagacity, *fully conversant with governmental problems*, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire."
>
> * * * * *
>
> "They were, of course, familiar with the modes of taxation pursued in the several states. From the report of Oliver Wolcott, when Secretary of the Treasury, on direct taxes, to the House of Representatives, December 14, 1796, his most important state paper (Am. State Papers, I. Finance, 431) and the various state laws then existing, it appears that *prior to the adoption of the Constitution* nearly all the states imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property,

and that, in addition, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from possessions, trades and employments." (Emphasis ours.)

From the foregoing it is evident, beyond peradventure of doubt, that the Makers of our Constitution—being students of Legislative and Economic experiences of all countries—were well advised of the frequent resort by other governments to the taxing of incomes for the raising of revenues. It is equally certain that the Makers of our Constitution knew of, and many of them lived under, income tax laws of some of the States.

It therefore follows that when Article III, Section 1 was evolved in the words—

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

the Makers of the Constitution intended exactly what was said with reference to the unqualified inhibition of any diminution of the compensation of Judges.

In other words, with the repeated instances of governmental use of Income Taxes clearly in their minds, the Makers of the Constitution, had they intended any exception or qualification to the second sentence of Article III, Section 1, by every rule of sound reasoning would have incorporated such qualification or exception in the provision.

For instance, to have made this Section read as the Government now contends it should be read by inter-

pretation, it would only have been necessary to have stated this part of the Section as follows:

> "The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which, *except for the application thereto of non-discriminatory income tax laws,* shall not be diminished during their continuance in office."

In short, by the use of less than a dozen words, the Makers of our Constitution, had they intended what the Government here contends, could have easily and completely encompassed the situation.

The Makers of the Constitution, with complete knowledge in the premises, not having so qualified the provision, it is submitted that it is not within the province of any legislative body, or of a Court, to read such qualification into the provision as enacted.

And, a fortiori, it is not within the province of a legislative body to seek to accomplish the same result by indirection and, as described by the Court in *Evans vs. Gore,* 253 U. S. 245, 64 L. Ed. 887, "by evasion."

Contemporary History at Time of the Adoption of the Constitutional Provisions Must Be Consulted

In *United States v. Lefkowitz,* 285 U. S. 452, 76 L. Ed. 877, this Court, through Mr. Justice Butler, said—

> "And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisons. M'Culloch v. Maryland, 4 Wheat. 316, 406, 407, 421, 4 L. Ed. 579, 601, 602, 605; Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524, supra; Byars v. United

States, 273 U. S. 28, 71 L. Ed. 520, 47 S. Ct. 248, ubi supra."

Not only must regard, however, be had to the principles upon which the Federal Constitution was established as measuring the purpose or scope of its provisions but contemporary history at the time of the adoption of the Constitution must be respected. This has been held in many cases.

Thus, in *Missouri vs. Illinois*, 180 U. S. 208, 45 L. Ed. 497, it was held that this Supreme Court when called upon to construe and apply a provision of the Constitution of the United States must look, not merely to its language, but to its historical origin.

Similarly, in *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, it was held that the necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning.

To like effect, see *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233, and *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 39 L. Ed. 759. holding, respectively, that "the history of the times and * * * the state of things existing when it was framed and adopted" and "the historical circumstances attending the framing and adoption of the Constitution," must be consulted in construing the Constitution.

It is admitted in Appellant's brief that this Court has held, in *Evans v. Gore, supra*, that a non-discrimina-

tory income tax computed by including a Judge's official salary in gross income, is violative of Article III, Section 1, and that his present position is contrary to *Evans v. Gore, supra,* (decided in 1920).

Appellant asks a reconsideration of that case by this Court and is at this time asking this Court to reverse that case (p. 10).

We at this time will review the various attempts of the Congress to levy income taxes on the salaries of Judges of the United States Courts.

B.

The Consequent Breadth of the Impulse and the Intent to Assure the Independence of the Judiciary, and Its Portrayal in the Implicit Prohibitions Upon the Taxation of the Judiciary by Separation of the National Government Into Three Departments.

History of Legislation to Tax Compensation of Federal Judiciary and Decisions Striking Down Same

The first effort to tax the compensation of the Judges of the United States Courts was in 1862, when a statute (12 Stat. 472) was enacted levying a tax of three per cent on the salaries of civil officers of the Government, which was construed by the revenue officers to include the Judges of the United States Courts. Mr. Chief Justice Taney, in a letter to the Secretary of the Treasury, dated March 10, 1863, in very positive language stated that the Act as applied to Judges was unconstitutional and void, and protested the action of the Treasury Department. Chief Justice Taney stated, after quoting Section 1 of Article III, of the Constitution of the United States, (157 U. S. 701, 39 L. Ed., 1155):

"The Act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their (its) compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"*Upon these grounds I regard an Act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void;* * * *".

In 1869 the Secretary of the Treasury referred the question to Attorney General Hoar, who concurred with the Chief Justice (13 Ops. Atty. Gen. 161) who came to the conclusion that:

"A tax upon the salary of an officer, to be deducted from what would otherwise be payable as sal-

ary, is a diminution of his compensation and in the cases of the President and Judges of the Supreme Court and Inferior Courts of the United States such diminution would fall within the prohibition of the Constitution, if the Act levying the tax was enacted during the official term of the President or of the Judge affected thereby."

The tax was discontinued as to Judges, and sums theretofore collected were refunded through administrative action, and by decision of the Court of Claims (*Wayne v. U. S.*, 26 Ct. Clms. 274), followed by the necessary appropriations by Congress. *Thus,* the *Chief Justice* the *Attorney General,* the *Secretary of the Treasury,* the *Court of Claims* and the *Congress,* in effect, held that the Act was invalid.

The Income Tax Act of 1894 (28 Stat. 509) contained no express reference to the salaries of United States Judges, but Mr. Justice Field regarded them as included and assigned that as one reason for holding the Act unconstitutional, *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 604, 39 L. Ed. 759. On motion for a rehearing Attorney General Olney in his brief stated that there had never been a doubt since the opinion of Attorney General Hoar as to the salaries of the President and the Judges being exempt.

The Income Tax Acts of 1913 (38 Stat. 168), 1916 (39 Stat. 758), and 1917 (40 Stat. 329) excepted the compensation of Judges.

An effort was made to tax the income of United States Judges by a provision in the Revenue Act of 1918, Section 213a. (40 Stat. 1065) defining gross income as follows:

"Includes gains, profits, and income derived from salaries, wages, or compensation for personal service

> (including in the case of the President of the United States, the Judges of the Supreme and inferior Courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or of the District of Columbia, the compensation received as such), * * *."

This provision was held unconstitutional in *Evans v. Gore*, 253 U. S. 245, 64 L. Ed. 887, and *Miles v. Graham*, 268 U. S. 501, 69 L. Ed. 1067.

The first challenge to this provision was in *Evans v. Gore, supra*. Judge Evans of Kentucky, who took office long prior to the date the statute was enacted, paid the tax under protest, claimed a refund, which was denied, and thereupon sued Gore, the Collector, to recover. The court below sustained a demurrer to the petition, but was reversed by the Supreme Court in a comprehensive opinion by Mr. Justice VanDevanter, on the ground that the Act operated to diminish the compensation of a United States Judge during his continuance in office, in violation of Section 1 of Article III of the Constitution.

Mr. Justice VanDevanter, in the opinion in *Evans v. Gore, supra*, states:

* * * * * *

> "Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington, 'the keystone of our political fabric,' the convention with unusual accord incorporated in the Constitution the provision that the judges 'shall hold their offices during good behavior, *and shall at stated times* receive

for their services *a compensation* which shall *not be diminished* during their continuance in office.' Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task, and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist, No. 79): 'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . .'. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will* . . . .' * * *

"*This provision for the support of the judges bears every mark of prudence and efficacy;* and that it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges. The several commentators on the Constitution have adopted and reiterated this view,—*Judge Story* adding: 'Without this provision (as to an undiminishable compensation), the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery;' and Chancellor Kent observing: 'It tends, also, *to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.*'

"These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench, and to pro-

mote that independence of action and judgments which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution, and to the administration of justice without respect to persons, and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, *not restrictively,* but in accord with its spirit and the principle on which it proceeds.

* * * * *

"But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

"If the tax in respect of his compensation be prohibited, it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

"The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries." (Emphasis ours.)

The Act of 1918 was again tested in *Miles v. Graham.* Judge Graham of the United States Court of Claims, appointed after the passage of the Act of 1918, paid the tax under protest and sued Miles, the collector, to recover. He contended that the salary of any Judge of a United States Court was not subject to the tax regard-

less of whether he was appointed before or after the enactment of the statute. The Government contended that Congress might provide for the taxation of the salary of a Judge subsequently taking office. In other words, that, as Judge Graham had entered office subsequent to the enactment of the taxing law, his salary was not being diminished during his continuance in office by requiring its inclusion as gross income and subjecting it to an income tax. In this connection the Court said:

> "The words and history of the clause (Sec. 1, Art. III) indicate that the purpose was to impose upon Congress the duty *definitely* to declare what sum shall be received by each Judge out of the public funds and the *times* for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office."
>
> * * * * *
>
> "No judge is required to pay a definite percentage of his salary, but all are commanded to return, as part of 'gross income' 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemption varying with family relations, etc., and upon the net result assessment is made. *The plain purpose was to require all Judges to return their compensation as an item of 'gross income' and to tax this as other salaries. This is forbidden by the Constitution.*
>
> "The power of Congress definitely to fix the compensation to be received at stated intervals by Judges thereafter appointed is clear.
>
> "It is equally clear, we think, that there is no power to tax a Judge of a Court of the United States on account of the salary prescribed for him by law." (Emphasis ours.)

It should be noted that Mr. Justice Holmes did not dissent to this opinion.

The *Evans Case* was decided on the theory that an income tax imposed on the compensation of a Judge diminishes his stipend guaranteed by the Constitution, and the *Graham Case* on the hypothesis that the Constitution not only protects a Judge against the *diminution* of his salary but imposes an affirmative duty on Congress to guarantee him a *definite* compensation, *payable* to him *at stated times*, which shall not be *diminished*.

Until the case of *Miles v. Graham* is overruled, the provision of the Revenue Act, taxing the salaries of Judges of the Federal Courts who took office after June 6, 1932, is, without doubt, invalid under the Constitution. In the case of *Miles v. Graham* the Supreme Court did not at all consider whether Graham, as a Judge of the Court of Claims, was a Judge of a Constitutional Court or a Legislative Court, as later it did in the case of *Williams v. United States*, 289 U. S. 553, 77 L. Ed. 1372, but as the point was not raised, it discussed the law on the assumption that Graham was a Judge of a Constitutional Court.

The provision of the Revenue Act of 1918 was contained in the Revenue Acts of 1921, 1924 and 1926. The *Graham Case* was decided in 1925. No further effort was made by Congress to tax the salaries of the United States Judges thereafter, until the ingenious method of circumventing the Constitution appeared in the Act of 1932. The same provision was incorporated in the Revenue Acts of 1934 and 1936.

Implicit Prohibition on Power to Tax Judiciary

The Constitution contains an implied prohibition on the power of Congress to tax the compensation of the Judiciary. The theory of government as outlined by the Constitution demands an implied prohibition on one department of the Government exercising a dominating influence and control over another.

The powers of the Federal Government are vested in three departments, legislative, executive and judicial. Article I provides for the legislative and defines its powers and duties; Article II provides for the executive and defines its powers and duties; and Article III provides for the judicial and defines its powers and duties. These departments are coordinate and are intended to be as relatively independent of each other as possible to serve as a check on each other and a balance on the conduct and action of the Government as a whole. *Kilbourn v. Thompson,* 103 U. S. 168, 190-2, 26 L. Ed. 377; *United States v. Midwest Oil Company,* 236 U. S. 459, 510, 59 L. Ed. 673; *Myers v. United States,* 272 U. S. 52, 116, 71 L. Ed. 160; *Springer v. Philippine Islands,* 277 U. S. 189, 201, 72 L. Ed. 845. This relation must be strictly observed to insure the fullest measure of independence, liberty and justice. When one of these departments is subjected to the will of another, its power and influence is affected, a check is removed, the balance is lost, and this fundamental theory of government is destroyed.

A grave danger was pointed out by Alexander Hamilton in The Federalist No. 78, when he said:

> "The Executive not only dispenses the honors, but holds the sword of the community. The Legis-

lature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment."

Mr. Hamilton further said in The Federalist No. 79:

"Next to permanency in office, nothing can contribute more to the independence of the Judges than a fixed provision for their support. * * * In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"

Chief Justice Marshall said (Debates Va. Conv., 1829-1831, pp. 616, 619):

"The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he (a Judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? * * * I have always thought, from my earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

In *People v. Draper,* 15 N. Y. 544, Denio, C. J., speaking with his accustomed vigor and trenchant style, summed up this principle of constitutional law, as follows:

"But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against any-

thing contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance."

If anything need or could be added to the opinion of Mr. Justice Van Devanter in *Evans v. Gore* in dealing with the theory of the Constitution pertaining to the Judiciary and the importance of maintaining the independence of its Judges, it will be found in the virile opinion of Mr. Justice Sutherland in *O'Donoghue v. United States,* 289 U. S. 516, 77 L. Ed. 1356. This case involved the question of whether Section 1 of Article III of the Federal Constitution applied to the Supreme Court and the Court of Appeals of the District of Columbia, and whether the compensation of the Justices of such Courts may lawfully be diminished during their term of office. The Court answered the first question in the affirmative, and the second question in the negative.

In the opinion in the *O'Donoghue Case,* Mr. Justice Sutherland said:

"If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important, that *each department should be kept completely independent of the others*—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law

lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' 1 Andrews, Works of James Wilson, (1896) p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments * * 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' 1 Story, Const., 4th ed., Sec. 530. To the same effect, The Federalist (Madison) No. 48. And see Massachusetts v. Mellon, 262 U. S. 447, 488, 67 L. Ed., 1078, 1085, 43 S. Ct. 597.

"The anxiety of the framers of the Constitution to preserve the independence *especially of the judicial department* is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. This requirement was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of Great Britain, declared that he had *'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'*

"In framing the Constitution, therefore, the power to diminish the compensation of the federal judges *was explicitly denied,* in order, inter alia, that their judgment or action might *never be swayed in the slightest degree* by the temptation to cultivate the favor or avoid the displeasure of that department which, *as master of the purse,* would otherwise hold the power to reduce their means of support. The high importance of the provision, as the contemporary history shows, was definitely pointed out by the leading statesmen of the time. Thus, in The Federalist, No. 78, Hamilton said—*'The complete inde-*

pendence of the courts of justice is peculiarly essential in a limited Constitution.'

* * * * *

"In a very early period of our history, it was said, in words as true today as they were then, that 'if they (the people) value and wish to preserve their Constitution, they ought never to surrender the independence of their judges.' Rawle, Const. 2d ed. 281.

"We need not pursue this phase of the subject further. It is fully discussed in Evans v. Gore, 253 U. S. 245, 64 L. Ed. 887, 40 S. Ct. 550, 11 A. L. R. 519, where this court (pp. 248, 249) said:

* * * * *

"'Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.'

"In the light of the foregoing views—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. * * *" (Emphasis ours.)

In the cases of *Booth v. United States* and *Amidon v. United States*, 291 U. S. 339, 78 L. Ed. 836, the issues were as to—

1. Whether or not a retired Federal Judge nevertheless continues in office within the meaning of Article III, Section 1 of the Constitution forbidding diminution of compensation during continuance in office, and

2. Whether or not,—where the salary of such a Judge was increased after his appointment and he is subsequently retired—a reduction of his compensation to an amount not below that fixed by law as his salary at the time of his appointment, is a diminution of his compensation within the meaning of Article III, Section 1 of the Constitution.

Both questions were answered affirmatively.

Speaking to the latter issue, the Court, through Mr. Justice Roberts, at page 840, remarked:

> "In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative. Several courts, in well-considered decisions, have so interpreted analogous provisions of State constitutions (Com. ex. rel. Hepburn v. Mann, 5 Watts & S. 403; New Orleans v. Lea, 14 La. Ann. 194; Long v. Watts, 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 277) and the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of Par 1, of Article 3."

It should be noted that Mr. Justice Holmes, who dissented in the case of *Evans v. Gore*, cited that case with approval in the case of *Gillespie v. The State of Oklahoma*, 257 U. S. 501; 66 L. Ed. 338.

As has been stated in these various opinions the judicial branch of the Government is the weakest of all. It

has neither the purse nor the sword. It is dependent upon annual appropriations for the bread upon which its Judges live. The courts are dependent upon the President to furnish marshals to execute their decrees. If, then, they are to administer the Constitution according to its true spirit, as the protectors and guardians of the weak against the strong, and to uphold the righteous cause against the encroachments of injustice, they must be shielded by guarantees of requisite independence in order that they may act impartially. The makers of this epochal instrument were perfectly aware of the waves of passion which frequently run through the legislative and executive branches of the Government. They knew that these judicial bodies would be called upon occasionally to point out what the Constitution means; that it might become necessary to declare that certain enactments of Congress were void and of no effect, because they were unconstitutional, and that they might thus provoke virulent hostility and popular prejudice. So they said that their salaries should not be diminished, because they were not in accord with the legislative or executive departments of the Government, or in sympathy with the prevalent currents of popular feeling in the nation. They likewise said that their Judges should not be turned out of office, but should remain as long as they lived, provided they properly demeaned themselves.

A most ancient and, therefore, hallowed precedent in favor of the establishment of an independent judiciary is the statute of Alphonso V of Arragon, in 1442, providing Judges should continue in office "during life, removal only on sufficient cause by the King and Cortez united." And in The Federalist, No. 78, it finds more modern expression:

"And it is the best expedient which can be devised in any Government to secure the steady, upright and impartial administration of the laws."

Appellant in his brief, on page 36, observes that the perpetuation of the exemption from Federal taxation, conferred by *Evans v. Gore,* would be particularly bizarre if the same Judges were held to be subject to State taxation under the principles of *Graves ex rel. N. Y. v. O'Keefe,* (Present Term), —— U. S. ——, 83 L. Ed. 577 (Adv. ops.). A complete answer to this observation is Mr. Justice Van Devanter's statement, in the opinion of *Evans v. Gore,* to this effect:

* * * * *

"Is it not, therefore, morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the Judiciary, intended to protect the compensation of the Judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and, in our opinion, due regard for its spirit and principle requires that it shall be taken as directed against them all."

The prohibitions of the National Constitution are equally effective upon all the States, because the laws of the Federal Government, within its jurisdiction, are the Supreme Law of the land. (*Pollock v. Farmers Loan & Trust Co., supra; Dodge v. Woolsey,* 18 How. 331, 15 L. Ed. 401; *Neal v. Delaware,* 103 U. S. 370, 26 L. Ed. 567; *Taylor v. Thomas,* 22 Wall. 479, 22 L. Ed. 789.)

The Court here clearly condemned, as in violation of Section 1 of Article III of the Constitution, any attempted diminution of salaries of Judges, however characterized; and

specifically denounced as illegal any attempted evasion through the medium of an Income Tax mechanism—state or federal.

The principle is aptly stated in *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903, where the Court held that the Constitution was intended to prohibit things, not names, and that its provisions cannot be evaded by giving a new name to an old thing.

Appellant, in his brief, on page 11, asserts:

> "A non-discriminatory tax on net income is not a reduction of compensation *nor can it possibly be made the means to exercise indirect control over the Judiciary.*"

Justice Parke, in the case of *Gordy v. Dennis*, Court of Appeals of Maryland, filed March 29, 1939, so completely answers this contention that we quote from his opinion:

> "By way of emphasis, it may be said in further reply to one of the grounds of the first reason that the contention that the liability of a member of the judiciary to pay taxes on his salary cannot possibly be made an attack on his independence does not bear examination. The answer to this assumption is to be found in its permitted consequences. The salary received by a judge is not the income of real or personal property, but the monetary reward paid by the State for his personal service in the discharge of his official duties, and no form of income offers less resistance to the lawful imposition of a tax. The admitted constitutional limitations, which for the preservation of his independent position, prevent a diminution of a judge's salary during his incumbency by legislation which would reduce his compensation by a change in its amount or by the levy of a specific tax, would afford him no adequate guaranty if the General Assembly may impose an income tax upon his net income from which his salary may not be excluded. If

under the guise of an income tax, the salary may be taxed as income, the present rate may be increased to any percentage the Legislature wills. The right of the sovereignty to tax is a power to consume and to destroy.

"Nor will there be found any protection in the incidence of the tax upon other taxpayers. No method of taxation equals the income tax in the multiform classification of taxpayers indulged and in the variety of rates imposed according to the respective amounts of the income. The most numerous class embraces all those who are excluded from paying the tax because their income does not exceed the prescribed minimum. It is this non-taxed class which in a democracy dominates the fiscal policy of the nation since its number makes for political predominance. If the constitutional requirement of equality and uniformity of the imposition of taxes upon real and tangible personal property and the laying of duties or taxes with a political view for the good government and benefit of the community permit a multiplication of classes for taxation according to wealth in income from those sources and from the exertions of its possessor and the judiciary are within the purview of such legislation then [illegible] principle, once allowed, may be carried to any extent and the judiciary will sit in subserviency to the will of the Legislature. The loss of independence will be measured not so much by the certainty of the present as by the apprehension of future antagonistic or retaliatory legislation. The income tax now sought to be imposed diminishes the salary by the entire amount of the tax, if the salary is the sole income of a judge. If the judge has other income, then his salary is diminished in part to the extent of its proportionate contribution to the payment of the tax. If this be law, the extent of this method of diminution in the future will depend wholly upon the exercise, from time to time, of legislative pleasure, and the peril which the Constitution sought to prevent will have been revived by judicial fiat."

Exemption of Judicial Compensation From Reduction Not a Privilege or Gratuity, But Is Based Upon Valuable Consideration, Namely, Judicial Sacrifices

The interdiction contained in Section 1, Article III against diminution of compensation has its own particular value to the citizens in securing the independence of the judiciary. It tends to establish the compensation upon a permanent foundation whereby judicial preferments may be accepted by those who are qualified by talent, knowledge, integrity and capacity, but are not possessed of such a private fortune as to make an assured salary an object of no personal concern. As was stated in *Commonwealth v. Mathues,* 210 Pa. 372, 59 Atl. 961, 973—

> "The Judiciary are peculiar unto themselves, an independent and high class of officials for exceeding long terms, giving their entire time to the public service and distinguished from other officials by the fact that in taking office they are deprived by law and custom from deriving an income from prior and usual sources, being confined to their salaries alone for subsistence, with the always present public necessity of keeping up and supporting their absolute independance and dignity, and this, not so much for the benefit of the Judge, as for the good of society as a whole."

Acceptance of an appointment as a Judge, although one of high honor and great dignity, entails many sacrifices incident thereto. The Judge is immediately deprived, to a great extent, of social contact with his fellow lawyers; he severs his connection with his clients; he relinquishes his position at the Bar, with all its professional emoluments and, holding himself aloof from both professional and social contacts with those with whom he would other-

wise associate, monastic-like dedicates himself exclusively to the discharge of the duties of his high position.

After commenting upon these necessary sacrifices, the Court, in the case of *Gordy v. Dennis, supra,* concluded—

> "So it is irrefutable that the guaranty against reduction of salary by the imposition of a tax is not an exemption from taxation in the sense of freedom from a burden upon service to which others are liable. The exemption for a public purpose or a valid consideration, is merely a nominal exemption, since the valid and full consideration, or the public purpose promoted, is received in the place of the tax."

Likewise, in *Evans v. Gore,* it is said—

> "These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench, and to promote that independence of action and judgment which is essential to the maintenance, of the guaranties, limitations, and pervading principles of the Constitution, and to the administration of justice without respect to persons, and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

Salaries received by Judges of like importance in other jurisdictions, for purposes of comparison with the salaries of our Federal Judges, are set out below:

England[1]

Lord Chancellor	$50,000.00
Lord Chief Justice	$40,000.00
Lord Justices of Appeal and other Justices of High Court	$25,000.00

Union of South Africa

Chief Justice	$17,500.00
Judges of Appeal	$16,250.00

Transvaal, Provincial Division

Judge President	$15,000.00
Puisne Judges	$13,750.00

Cape of Good Hope, Provincial Division

Judge President	$15,000.00
Puisne Judges	$13,750.00

Natal Provincial Division

Judge President	$15,000.00
Puisne Judges	$13,750.00

Orange Free State, Provincial Division

Judge President	$15,000.00
Puisne Judges	$13,750.00

Commonwealth of Australia

High Court of Australia

Chief Justice	$17,500.00
Justices	$15,000.00

Court of Conciliation and Arbitration

Chief Justice	$15,000.00
Judges	$12,500.00

[1]The United States equivalent of the British pound Sterling is approximated at five dollars.

Dominion of Canada	
Supreme Court	
Chief Justice	$15,000.00
Puisne Judges	$12,500.00
New York	
Court of Appeals	$22,500.00 or[1] $22,000.00
Supreme Court	$15,000.00
Massachusetts	
Supreme Court	$15,000.00 or $14,000.00
Superior Court	$13,000.00 or $12,000.00
Pennsylvania	
Supreme Court	$20,000.00 or $19,500.00
Superior Court	$18,500.00 or $18,000.00
Common Pleas Court	$ 9,000.00 to[2] $14,000.00
Ohio	
Supreme Court	$12,600.00 or $12,000.00
Connecticut	
Supreme Court	$12,500.00 or $12,000.00
Illinois	
Supreme Court	$15,000.00

[1]Where two figures are given the first is for the chief or presiding judge.

[2]According to population of district.

C.

Conclusions Reached by State Courts, With Respect to Like Constitutional Provisions.

Cases Cited by Appellant Distinguished

The Appellant devotes a portion of his brief (Pages 28-35) to the "taxability of State Judges under State income tax legislation." It might be well to note in approaching these decisions that the Federal Government is one of granted powers, whereas the State powers are inherent in the Legislature, except where expressly limited by the State Constitution or limited by grant to the Federal Government in the United States Constitution. As is said in *Taylor Gehner*, 329 Mo. 511, 45 S. W. (2d) 59, 60 (1932), concerning State Constitutions:

> "The power to tax is not granted by the Constitution; it is inherent in the Legislature. There are no restrictions or limitations upon the power, except such as are expressly imposed by the State and the Federal Constitution."

Of the cases relied upon by the Appellant as having constitutional provisions similar to Section 1 of Article III of the Federal Constitution, and holding that the salary of the Judge was subject to the tax, in all but two the constitutional provisions were so dissimilar to those of Section 1, Article III of the Federal Constitution, that the respective Courts based their departure from the decision of *Evans v. Gore,* and other Federal cases, on these dissimilarities.

Thus in *Poorman v. State Board of Equalization,* 99 Mont. 543, 45 P. (2d) 307 (1935), the Court after quoting the provision in the Montana Constitution that:

"the justices of the supreme court and the judges of the district courts shall each be paid quarterly by the state, a salary, which shall not be increased or diminished during the terms for which they shall have been respectively elected."

proceeded as follows:

"If we had no further constitutional provision on this subject, we might be constrained, for the reasons stated therein, to follow the majority opinion in Evans v. Gore, above, or declare with the Supreme Court of North Carolina that the Legislature did not intend to include the judiciary in imposing an income tax, for that we would then, perhaps, be justified in protecting this department from even the suspicion of oppression or coercion. However, we have the further constitutional prohibition that 'except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment.***' Section 31, art. 5. Here we have a direct restriction upon the otherwise plenary power of the legislative department in this regard, which is all-inclusive, *and renders all other prohibitions in the Constitution contained mere surplusage*, as there is nothing 'otherwise provided' in the Constitution which is now effective.

* * * * *

"However, we have indulged in this discussion, not for the purpose of rejecting the pronouncements of the Gore Case, followed in the Miles Case and in Long v. Watts, supra, on the ground that a like holding would render the enforcement of the provisions of our Income Tax Act well-nigh impossible, but for the purpose of demonstrating that the reasons for those decisions, perhaps cogent under the fact conditions there disclosed, have no place in the consideration of a claimed exemption in favor of a judge under our constitutional prohibition. A further rea-

son why the Gore decision lacks persuasive strength here is, as noted above, that the court was dealing with judges who serve for life, while here we are dealing with a swarm of elective and appointive officers, no one of whom can hold office for a term of more than six years. * * *

* * * * *

"From the foregoing it will be noted that there is no clear weight of authority the one way or the other. Of the decisions directly in point, we have, on the one hand, *Evans v. Gore and Long v. Watts, construing constitutional prohibitions dissimilar to ours;* on the other hand, State ex rel. Wickham v. Nygaard and Taylor v. Gehner, construing provisions identical with, or at least similar to our own. * * * As noted above, the constitutional provision construed applied only to the salaries of judges and was interpreted in the light of the history of the oppression of the judiciary for improper ends, while our prohibition is so broad and all-inclusive as to bring all public officers, of every department and rank, within the immunity, were we to follow the majority opinion; * * *" (Emphasis ours.)

In *Martin v. Wolfford,* 269 Ky. 411, 107 S. W. (2d) 267 (1937), the constitutional provisions construed were:

"Section 161 of the Constitution provides: 'The compensation of *any city, county, town, or municipal officer* shall not be changed after his election or appointment, or during his term of office.'

"Section 235 provides: 'Salaries of *public officers* shall not be changed during the terms for which they were elected.'" (Emphasis ours.)

The Court, in the majority opinion, pointed out the distinction in the following language:

"It is our conclusion that the case of Evans v. Gore and other federal cases following this opinion

in construing section 1 of article 3 of the Federal Constitution have no application to the Kentucky Income Tax Law, nor to sections 161 and 235 of the Constitution of Kentucky, for the reason that this provision was inserted in the Federal Constitution for the specific purpose of barring Congress from destroying the judicial department under its unlimited taxing power. * * *"

A dissenting opinion filed by three of the Justices held the income tax was in the nature of a direct burden upon the salary of the Judge, and within the constitutional prohibition against the change in compensation of a public officer. The dissent also pointed out the weakness in Judge Holmes' attempt at argument reductio ad absurdum in his dissenting opinion in the *Evans v. Gore* case, also resorted to in the *Poorman* decision, and others, to the effect that to sustain such an exemption from the income tax would require an interpretation exempting the Judge from the gasoline tax and the property tax on his home, purchased from his salary. The opinion on this point is as follows:

"The argument made in the majority opinion following a like argument in the dissenting opinion of Judge Holmes in the Evans Case, supra, to the effect that there is no difference between the effect of an income tax on salary, and the effect on such salary of the taxes a judge has to pay out of his salary on a house he owns, or on a gallon of gasoline he may buy wherewith to run his automobile, or an excise tax that he may pay on a ticket to get into a moving picture show, disregards what Justice Holmes also says in his book on the Common Law, page 312: 'The distinctions of the law are founded on experience, not in logic. It therefore does not make the dealings of men dependent upon a mathematical accuracy,'

"Lord MacCauley, in his Essay on History, states the same proposition in these words: 'All questions in morals and politics are questions of comparison and degree.'

"The effect of an income tax on salary is so markedly different from the exceedingly indirect effect of a tax on judge's home or a tax on a moving picture ticket on that salary, that argument to sustain the proposition is superfluous. Such an indirect burden does not constitutionally affect the salary. But a direct burden, such as an income tax, must in the light of the authorities be conceded, in my judgment, to come within the constitutional prohibitions against a change in compensation."

As was pointed out in *DuPont v. Green,* —— Del. ——, 195 Atl. 273, (1937), not only was the constitutional provision under construction unlike that of Section 1 of Article III of the Federal Constitution, but the question of its application to the judiciary was not involved:

"At the very outset we must make clear a very broad and comprehensive distinction. Every case cited by the Defendant in Error, with the possible exception of one, involves the question of a reduction of a judicial compensation. Almost every case recites, in varying language, the historical background of division of government into three co-ordinate branches, and shows that the judicial department is necessarily and inherently the weakest of the three. Each case then elaborates the necessity of placing the financial independence of the judiciary beyond the control of the strongest co-ordinate branch, the legislative branch, and many cases, as Evans v. Gore, quote the language of Hamilton that 'a power over a man's subsistence amounts to a power over his will.' **With all of this reasoning we are in thorough accord, but it has no application to this case.** *Here we are not confronted with any diminution of judi-*

cial salary. The appellee claims exemption by reason of a constitutional provision.

"'No law shall extend the term of *any public officer* or diminish his salary or emoluments after his election or appointment.'

"*It is not necessary for us to determine whether the foregoing section has any application at all to the judicial department.*. It was determined in Pennsylvania (Com. v. Mathues, 210 Pa. 372, 59 A. 961) that a similar provision did not apply to the judiciary, *but as to this we express no opinion.*

* * * * *

"*We reiterate that we think the true basis of these decisions was the sound doctrine of maintenance of judicial independence,* and we venture to express some doubt as to whether the result would have been the same had the constitutional provisions been similar to our own as applying to every public officer." (Emphasis ours.)

In *Wickham v. Nygaard,* 159 Wis. 396, 150 N. W. 431 (1915); the provision of the Constitution construed was:

"Nor shall the compensation of *any public officer* be increased or diminished during his term of office * * *." (Emphasis ours)

The Court, noting this distinction, stated:

"* * * If it is settled that Judge Wickham's salary is exempt from assessment for income tax, then the salary of every other public officer is exempt during his term, where such term began before the passage of the income tax law. * * *

* * * * * *

"If the salary clause of the Constitution were the only one which affected the situation, an interesting question would be presented upon which no

great amount of authority can be found. *What little there is seems to support the relator's (plaintiff judge) contention.* * * *" (Emphasis ours.)

The Court, however, based its decision, in upholding the tax, on the theory that the Amendment to the Constitution, providing that—

> "Taxes may also be imposed on incomes, privileges and occupations, which tax may be graduated and progressive, and reasonable exemptions may be provided"—

amended the previously quoted provision of the Constitution, dealing with diminution of compensation, as far as income taxes were concerned—thus recognizing that the income tax does, in fact, constitute a diminution of a Judge's salary.

Of the only two state cases cited by Appellant involving similar constitutional provisions and holding contrary to *Evans v. Gore, supra,* and first above referred to, one, *Taylor v. Gehner,* in a very brief opinion, holding broadly that the State constitutional provision similar to that contained in Section 1 of Article III of the Federal Constitution could not possibly be designed to relieve Judges from the burdens of taxation, as it was never designed or intended as a tax exemption provision, cites as its sole authority the dissenting opinion of Mr. Justice Holmes in the *Evans v. Gore case.* The other, *Commissioners v. Chapman,* 2 Rawle 73, (Pa., 1829), can be disregarded, as the same Court in *Commonwealth v. Mann,* 5 Watts & Serg. 403 (Pa., 1843), came to the opposite conclusion, holding that the Judge's salary was not taxable.

State Cases Supporting Evans v. Gore

Two of the cases mentioned by the Appellant, as holding that the salary of the Judge was exempt from taxation, involved special taxes.

Thus, in *In re Opinions of the Justices,* 225 Ala. 502, 144 So. 111 (1932), the Court held that an occupational tax upon State and County officers violated two provisions of the State Constitution: One forbidding the reduction of salaries of judicial officers during their terms; the other forbidding the diminution of the salaries of public officers during their terms. However, the Court reiterated the rule, citing *Evans v. Gore,* that the Legislature could not do by indirection that which it could not do directly, that is, diminish the salaries of those protected by the Constitution.

In *New Orleans v. Lea,* 14 La. Ann. 197 (1859), a municipal tax was assessed solely against the official salary of the Judges, where the State Constitution provided:

> "The judges of both the Supreme and Inferior Courts shall at stated times receive a salary which shall not be diminished during their continuance in office."

And it was held that neither the State nor the City could tax the salaries of the Judges under this provision of the Constitution.

North Carolina has a constitutional provision almost word for word the same as Section 1 of Article III of the Federal Constitution.

> "The salaries of the judges of the supreme court, or of the superior courts, shall not be diminished during their continuance in office."

On two occasions recited below, the Supreme Court of that state has passed on the construction of this provision as a limitation on the taxing power of the State in respect to its Judges.

In *Matter of the Taxation of the Salaries of Judges*, 131 N. C. 692, 42 S. E. 970, (1902), appears the opinion of the Attorney General for North Carolina, adopted by the Court as its official opinion, in connection with the right of the State to tax the salaries of the Justices of the Supreme Court, and other State Courts, as a part of their taxable property. The Judges had not been returning their salaries for taxation purposes, and had not been called upon to do so until 1902, when the Corporation Commissioner ruled that they should be included, and directed the County Commissioners to proceed to collect the same. The Attorney General was called upon by the Court to render an opinion which would govern the situation.

In a thorough and exhaustive discussion of the subject, the Attorney General came to the conclusion that the prohibition contained in the constitutional provision quoted, exempted the Court from taxation, either direct or indirect. In arriving at this conclusion, he quotes from an opinion of his predecessor, dealing with a similar subject, as follows:

> " * * * By it (referring to the constitutional provision above quoted) the power of reducing the salaries of the judges during their continuance in office is taken away. They may be increased, but cannot be diminished. But to secure them effectually against diminution, this provision should extend to indirect as well as to direct legislation. The power to lessen these salaries by direct legislation is now nowhere claimed, yet the passage of this act

> is an assertion by the legislature of the power to diminish them indirectly; and, if the legislature has such power, it can be used to any extent to which, in its wisdom, it may see proper to carry it. * * * "

The Attorney General also makes reference to the distinction urged by the Collector, in his brief, with respect to the *Commonwealth v. Mann* case, *supra*, from Pennsylvania; that is, that the tax was to be collected by being withheld at the source. His language in this respect is as follows:

> "It is true that in the act of congress passed upon by Chief Justice Taney, as well as in the case of Com. v. Mann, 5 Watts & S., 403, cited by Atty. Gen. Bachelor (Appendix, 48 N. C.) the tax levied was deducted from the compensation fixed by law, and retained in the treasury. But in what way the method of collecting the tax imposed upon the salary affects the question involved, I am utterly unable to perceive. The principle announced by Chief Justice Taney, as well as by the supreme court of Pennsylvania in Com. v. Mann, supra, operates upon the power to tax, and not upon the incidental means employed to collect."

This matter again came before the Supreme Court of North Carolina, in the case of *Long v. Watts*, 183 N. C. 99, 110 S. E. 765, (1922). In this case the defendant Collector threatened to use legal process against the plaintiff Judge, to force him to list and pay income tax on that portion of his income represented by his official salary, and the plaintiff instituted this action for an injunction, contending that his salary as Judge was exempt by virtue of the aforementioned State constitutional provision.

The Court, in a very lengthy and exhaustive opinion, held in part as follows:

"A tax which indirectly takes from the plaintiff a part of that which, by law, he is entitled to receive for his services is clearly within the prohibition against diminution. Of what avail to him is the part paid with one hand and taken back with the other? Would it not, in reality, be the same as if such part had never been paid, or had been withheld in the first instance? * * * It is axiomatic, and universally accepted as a correct principle of law, that that which is prohibited from being done directly may not be accomplished by indirection. The people themselves, for reasons which they deemed to be wise and satisfactory, and for their own purposes, have thought it proper to withdraw from the field of taxation the official salaries of their judges. * * *

"* * * The holdings of a judge and his income, derived from other sources, are proper subjects of taxation. The plaintiff makes no objection to this, but he does complain at the ruling of the defendant which singles out his official salary as a special object of taxation, contrary to the Constitution which he has solemnly sworn to support.

* * * * *

"It was the evident purpose and intent of the people, when they inserted this clause in the Constitution, to prohibit any and every kind of diminution, direct or indirect, by taxation or otherwise. The Legislature is completely divested of the power to diminish the salaries of the judges in any manner or form whatsoever. Any other construction would do violence to the plain purport of the language employed, and render the clause meaningless. *The prohibition is general in its terms, and contains no excepting words.* The reasons in support of its adoption, as publicly advanced at the time, outweighed those against it; and its wisdom has never been seriously questioned. On the other hand, time apparently has demonstrated that the convention which submitted the amendment must have been endowed

with prophetic vision. Their minds were bent on safeguarding, protecting, and preserving the independence of the judiciary; and this they considered of far more importance to the state than any revenue that could come from taxing the salaries of the judges." (Emphasis ours.)

It concluded its opinion with the following summary:

"After a careful and earnest consideration of the record, we answer the questions propounded as follows:

"Is the plaintiff's income subject to tax? Yes. In this respect he stands on the same footing with other citizens of the state.

"Is his official salary to be included in his taxable income? No. The Constitution clearly and plainly provides otherwise.

"Let it be understood henceforth that this is the law as it is now written; **and it can make no difference whether the tax be levied before or after the taking of office.** The spirit as well as the letter of the Constitution must be observed. The judgment of the superior court, permanently enjoining the defendant from collecting the proposed tax on the plaintiff's official salary, was clearly correct. What the state pays or allows for his services as a judicial officer is not a proper item to be included in his taxable income." (Emphasis ours.)

In *Booth v. United States, supra,* this Court expressed approval of these "well considered" decisions. The opinion per Mr. Justice Roberts states—

* * * * *

"In other words, is a diminution *after an increase* banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the

affirmative. *Several courts, in well-considered decisions, have so interpreted analogous provisions of State constitutions (Com. ex. rel. Hepburn v. Mann,* 5 Watts & S. 403; *New Orleans v. Lea,* 14 La. Ann. 194; *Long v. Watts,* 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 277) and the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of Sec. 1 of Article 3."

On March 29, 1939, the Court of Appeals of Maryland in *Gordy v. Dennis, supra,* held that the salary paid a member of the Supreme Bench of the City of Baltimore could not lawfully be included in income upon which a tax is imposed by the State.

The constitutional provision of the State of Maryland, construed by the Court, provided that the compensation of any Judge in that State—

> "shall not be diminshed during his continuance in office."

The opinion, we submit, is the most exhaustive, comprehensive, thorough and well-reasoned treatise on the subject thus far presented by any Court. The contentions set forth in the minority opinion in the *Evans v. Gore* case, as well as the contentions and arguments set out in the Appellant's brief in the instant case, are each discussed, analyzed and, we feel, conclusively refuted in this able majority opinion. To quote from it would extend this brief far beyond its proper limits, and we therefore respectfully direct the Court's attention and scrutiny to this decision as being squarely in point.

Decisions of Foreign Jurisdictions

The Appellant cites decisions from other English-speaking countries. The lack of analogy or authority of these cases is pointed out in *Gordy v. Dennis, supra,* as follows:

> "The attention of the Court has been directed to decisions of the British and Colonial Courts which we do not discuss because of the fundamental differences in the conception of constitutional law in the United States and that which prevails in foreign jurisdictions. Dicey on the Law of the Constitution, 140, 141. For reference to these cases and annotations on the points involved see: 11 A. L. R. 535, 82 A. L. R. 986; 108 A. L. R. 1428; 114 A. L. R. 1184."

It will be remembered that in the case of England there is no written constitutional prohibition such as is contained in Section 1 of Article III of our National Constitution, and it is interesting to note that the English Parliament has gone so far as to directly reduce the salaries of English Judges. This was done in the recent National Economy Act of 1931 (21 and 22, Geo. V. c. 48), which authorized the reduction of the salaries of all "persons in His Majesty's service", and which was applied to the Judges and, over the earnest objections of the Judges themselves. This clearly indicates the difference in concept between the British Empire and the United States. And even the Appellant firmly asserts that a Salary Reduction Act with respect to the compensation of Judges would be diametrically opposed to the letter and spirit of our Constitution.

As was said by ex-President Wilson, in his "Constitutional Government in the United States," pp. 17, 142:

> "'Our courts are the balance wheel of our whole constitutional system; *and ours is the only constitu-*

tional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support of interpretation of authoritative, undisputable courts of law.' "

For the reasons stated, and under the principles pointed out by the Maryland Court, and President Wilson, the inapplicability of the "Other Countries" decisions is evident.

D.

If the Vulnerability of the Federal Judiciary to a Federal Income Tax Were Once Established, the Indisputable Susceptibility of the Federal Judiciary to Classification, Qua Judiciary, Would Permit Such Taxation to Be Exerted to Any Degree, and Thereby Encompass the Judiciary Department's Subservience to and Dependence Upon the Other Two Departments of the National Government, and the Presently Allegedly Light Burden of Such Income Tax Imposition Is No Measure of the Sacrifice of the Principle of Independence.

If Taxable at All, Judges May Be Classified as a Group, and Taxed Beyond the Levels Applicable to Other Avocations

If notwithstanding the provisions of Section 1 of Article III of the Constitution, and notwithstanding the rule implicit in Articles I, II and III of the Constitution requiring a separation of the three Departments of the Government and the independence of each Department from the other Departments, and notwithstanding the inherent inhibition against arbitrary and unreasonable classifications, Judges' compensations are subject to in-

come taxation, the Judiciary could be classified for taxation, and the quantum of the taxation that might be imposed would rest in the discretion of Congress. It would, therefore, follow that in taxation matters the Judiciary would be subject to the power of Congress, and to that extent rendered subservient to Congress.

Implicit in Articles I, II and III of the Constitution is the principle that the three Departments of Government—Executive, Legislative and Judicial—shall be independent, each of the other. But, as indicated, if Judges' compensations may be taxed, subserviency of the Judicial to the Legislative Department, through coercion incident to control of subsistence, would be possible. Speaking of this principle, in a like issue as to the taxing of Maryland Judges in violation of a Maryland constitutional provision identical in substance with Section 1 of Article III, the Court, in *Gordy v. Dennis, supra,* said:

> "If the Judge be subservient or dependent upon either the legislative or executive branch of the Government, the central unity, balance and harmony of the Government is destroyed. For the Judge to be free and independent, neither his tenure of service nor his subsistence may be at the will of the executive or legislative branch."

The authority of Congress to classify for the purposes of excise taxation, is very broad; in fact, so broad that before the Court will intervene and suspend a classification as violative of the Fifth Amendment, it must find the classification to be grossly lacking in basis and patently inequitable. *Steward Machine Co. v. Davis,* 301 U. S. 548, 81 L. Ed. 1279.

The factors which, in the language of the Court in *Commonwealth v. Mathues, supra,* at page 973, render the Judiciary "peculiar unto themselves" include, as to Federal Judges, *inter alia,* the following: Life tenures, fixed compensation, compensation payable at stated times, freedom from vicissitudes of business, and retirement on full pay, optional at 70 years of age.

With these several characteristics *peculiar alone to the Federal Judiciary* as warrant for its action—and assuming the taxability of Judges—Congress could justifiably classify, for income taxation purposes, the Federal Judiciary as a group.

In this general connection it will be recollected that in the 1932 Revenue Act, Congress classified Judges when it imposed the tax on those appointed subsequent to June 6, 1932, and, by non-inclusion, exempted Judges theretofore appointed. This was a classification, *inter se,* of Judges, and while, as we elsewhere herein contend, wholly without legal or other warrant, in that no difference or distinction whatsoever obtains between the two classes in respect of their respective ranks, stipulated compensation and work, the Congressional action, in all events, indicates that Judges, at least as an entire group, can be classified for taxation purposes.

The case of *Brushaber v. Union Pacific Railroad Co.,* 240 U. S. 1, 60 L. Ed. 493, approving the 1913 Income Tax Law, and the *Steward Machine Company Case, supra,* sustaining the Social Security Act, illustrate the wide range of entire groups which may be classified for excise taxation purposes, and for exemptions.

Welch v. Henry, —— U. S. ——, 83 L. Ed. 99, (adv. ops.) is the most recent illustration of the wide range of

discretion resting in legislative bodies, federal or state, with reference to classifications for taxation purposes.

The Wisconsin legislature retroactively classified and taxed as a class the recipients of corporate dividends received in 1933 at rates different from those applicable, in that year, to other types of income, and without deductions allowed in computing the tax on other income. The tax was sustained against the charge of unlawful discrimination. In a dissenting opinion by Mr. Justice Roberts it was pointed out that if the Legislature could evolve the classification under consideration, and the Court so decreed, then—

> "It was equally at liberty to form a taxable class of those who were granted personal exemptions, to wrest out of their setting, as part of the general income of a taxpayer, rents received, royalties received, *or professional income accrued in 1933*, and to impose a special income tax on one or all of these items."

It is submitted that the classification of professional income here visualized as legally possible, would require the like conclusion with reference to classifying the Avocation of Adjudication.

Assuming the valid imposition of a tax, and which necessarily would be predicated upon the validity of any incident classifications, the rule obtains that the quantum of the tax to be imposed is within the discretion of Congress; in other words, excessiveness, even though resulting in destruction, will not, of itself, invalidate the tax. In *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482, the constitutionality of an excise tax of 10% on a State Bank's circulation was attacked because of its excessiveness. The tax was sustained.

The Court answered (p. 488):

> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

In *McCray v. United States*, 195 U. S. 26, 49 L. Ed. 78, a 10% oleomargarine tax was attacked as excessive. The tax was sustained.

Speaking to the issue the Court remarked:

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (Spencer v. Merchant) that 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'" (P. 97.)

Speaking further as to the possible application of the Fifth Amendment, the Court said (p. 99):

> "That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without author-

> ity to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirecty affect subjects not within the powers delegated to Congress."

The rule is again announced by the Court in *Alaska Fish Salting and By-Products Co. v. Smith*, 225 U. S. 44, 65 L. Ed. 489.

The Windfall Tax Cases are unusually graphic illustrations of—

(a) The wide discretion in Congress with reference to classifications, and

(b) The unlimited discretion of Congress in the quantum of tax imposed, where the authority to tax is otherwise unquestioned.

In these cases, after the decision in *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 477, invalidating the Processing Tax, authorized by the Agricultural Adjustment Act of 1933, the subsequent Windfall Taxes to recover the profits resulting from increases in prices due to the Processing Tax, were sustained. The tax was 80% and, assumedly, the difference between the 80% and 100% had been theretofore paid in current income taxes. In consequence, the law sustained singled out a particular group of people and then imposed a tax which, in its cumulative effect, approximated 100%.

Sheridan Flour Mills, Inc., v. Cassidy, 87 Fed. (2d) 20 (10th C. C. A.).

White Packing Co. v. Robertson, 89 Fed. (2d) 775 (4th C. C. A.).

It has been suggested to be beyond the probabilities that Judges would be classified for income taxation and a level of tax charges imposed in excess of those made applicable to persons in other avocations enjoying generally like incomes.

This is a matter which does not lend itself to easy discussion, but history reveals the following:

(a) Our country has seen repeated waves of religious bigotry, reflected at times in legislation, and on one occasion requiring a decision of this Court to prevent from complete annihilation the Catholic Parochial Schools of Oregon. (*Pierce v. Society of Sisters of Holy Name*, 268 U. S. 510, 69 L. Ed. 1070.)

(b) Our country has seen waves of nationalities hatred and bigotry, translated on occasions into legislation, and requiring in one instance a decision of this Court to permit the continued instruction of foreign languages—the German language—in the common schools of Nebraska. (*Meyer v. State of Nebr.*, 262 U. S. 390, 67 L. Ed. 1042.)

(c) In our own times legislation was pressed for enactment in the Senate of the United States—S. 1392, re "Reorganization of the Federal Judiciary"—and concerning which the Adverse Report of the Senate Judiciary Committee contains the following summary (p. 23):

> "We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.
>
> "It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.

"It would not banish age from the bench nor abolish divided decisions.

"It would not affect the power of any court to hold laws unconstitutional nor withdraw from any judge the authority to issue injunctions.

"It would not reduce the expense of litigation nor speed the decision of cases.

"It is a proposal without precedent and without justification.

"It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of indivíual rights.

"It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the Government and the citizen.

"It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

"It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

"Under the form of the Constitution it seeks to do that which is unconstitutional.

"Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration.

"It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

That this attempted legislation failed is beside the question. The prophetic factor is that it was pressed for enactment, and with Administrative inception and encouragement.

Referring to a similar argument of improbability that a legislative body would exercise, against a judicial officer, in a coercive way, a taxing power, the Attorney General in *Matter of the Taxation of Salaries of Judges*, 131 N. C. 692, 42 S. E. 970 (1902), said:

"* * * If the general assembly has the power to impose a tax of 1 per cent on the official salary of a judicial officer, upon the same principle it could lay a duty which would cripple, if not completely paralyze, the whole system of the administration of justice in state tribunals. It is freely admitted that, in the absence of dire political revolutions, the exercise of such destructive power on the part of one branch of the government toward another is not likely to be invoked, but the improbability of the non-exercise of the power does not affect the principle. Upon this point I quote the following language from the supreme court of Michigan: 'The argument that such prohibitory action (the power to tax) is improbable has no force whatever in determining the existence or nonexistence of the power. There is no legislative power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable.' The foregoing citation is from the case of Fifield v. Close

(15 Mich. 505), and that learned jurist, Judge Cooley, concurred in the opinion of the court."

But aside from and irrespective of what can reasonably be deduced as probable or improbable legislative action, the unfortunate and discouraging lessening of the independence of the Judiciary which would result from a subjecting of Judges to Income Tax legislation, the quantum of which as well as incident classification may be determined at the will of the legislative body, is best described in the words of the Maryland Court in *Gordy v. Dennis, supra,* as follows:

> "The loss of independence will be measured, not so much by the certainty of the present as by the apprehension of future antagonistic or retaliatory legislation."

We urge an adherence to the principles stated by the great Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, wherein he said:

> "The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?"

II.

THE SOURCE OF THE SALARY INCOME OF THE FEDERAL JUDICIARY CANNOT BE IGNORED IN AN ATTEMPTED ASSESSMENT OF AN INCOME TAX THEREON IN THE FACE OF SECTION 1, ARTICLE III OF THE NATIONAL CONSTITUTION, PROTECTING IT FROM DIMINUTION.

Evans vs. Gore Analysis

As has been said before, it is urged by the Appellant that *Evans v. Gore* should be reversed. The conclusion of Mr. Justice Van Devanter is that the imposition of a non-discriminatory Federal Income Tax upon the salary of a Judge of the Court of the United States would amount to a diminution within the meaning of Section 1, Article III of the Constitution.

Concisely summarized, the Court held, in *Evans v. Gore*—

(1) That the Constitutional prohibition against the diminution of salaries of Federal Judges during continuance in office is to be construed as a limitation imposed in the public interest and not as a private grant for the benefit of the members of the Judiciary.

(2) That the Sixteenth Amendment, relating to the Income Tax, does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the States, of taxes laid on income from whatever source derived; and

(3) That any diminution whose necessary operation and effect withholds or takes from a Federal

Judge a part of the compensation promised by law for his services is forbidden by the Constitutional provision and the prohibition embraces and prevents diminution by taxation.

We assume that Appellant concedes the second proposition enumerated above, since no discussion of the effect of the Sixteenth Amendment is included in his brief.

Appellant contends, however—

(1) That Section 1 of Article III was never intended to be a limitation on the taxing power of the Federal Government.

(2) That a non-discriminatory Income Tax on net income from all sources does not diminish the compensation of Judge Woodrough; and

(3) That if it does diminish the compensation of Judge Woodrough, it is not such a diminution as is prohibited by Section 1 of Article III.

Source of Salary Income Cannot Be Submerged in "Aggregate Income" Theory

The same contentions made by the Appellant were made by the Government, in *Evans v. Gore,* and were again recently made by the Comptroller of the State of Maryland, in the case of *Gordy, Comptroller of the State, v. Dennis,* —— Md. ——, —— Atl. ——, (decided by the Court of Appeals of Maryland on March 29, 1939), holding that the salary paid a member of the Supreme Bench of the City of Baltimore could not lawfully be included in gross income subjected to a non-discriminatory State Income Tax because of the Constitutional provision of the

State of Maryland providing that the compensation of any Judge in that State "shall not be diminished during his continuance in office." The contentions set forth in the dissenting opinion, which follows Mr. Justice Holmes' dissenting opinion in the *Evans v. Gore* case, as well as the contentions set forth in the Appellant's brief in the case at bar, are each discussed, analyzed, and, we feel, conclusively refuted in the able majority opinion.

Mr. Justice Parke in his opinion stated:

> "The argument was made that the tax was upon the judge's income, and, consequently, since the income was the money yield received by the judge from various sources, his salary or compensation, although included in his income for the purposes of taxation, was not diminished by the imposition of a tax upon an income of which the the salary might constitute the whole or a part, accordingly as he did or did not have other sources from which he derived a yield. It is difficult to follow reasoning which has different results by the simple device of calling the same thing 'salary or compensation,' for one result, and 'income' for another result."

Parenthetically, the foregoing is particularly apposite, in the light of the following from *Craig v. Missouri,* 4 Pet. 410, 7 L. Ed. 903, where Chief Justice Marshall said:

> "* * * Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, *big with great and ruinous mischief,* which is expressly forbidden by words most appropriate for its description, may be performed by *the substitution of a name?* That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. * * *" (Emphasis ours.)

As was said in this respect in *Matter of the Taxation of the Salaries of Judges,* 131 N. C. 692, 42 S. E. 970 (1902) striking down an income tax on judicial salaries:

> " * * * By it (referring to the constitutional provision involved) the power of reducing the salaries of the judges during their continuance in office is taken away. They may be increased, but cannot be diminished. But to secure them effectually against diminution, this provision should extend to indirect as well as to direct legislation. The power to lessen these salaries by direct legislation is now nowhere claimed, yet the passage of this act is an assertion by the legislature of the power to diminish them indirectly; and, if the legislature has such power, it can be used to any extent to which, in its wisdom, it may see proper to carry it. * * *".

Again, in the case of *Long v. Watts,* 183 N. C. 99, 110 S. E. 765 (1922), the Court holds:

> "A tax which indirectly takes from the plaintiff a part of that which, by law, he is entitled to receive for his services is clearly within the prohibition against diminution. Of what avail to him is the part paid with one hand and taken back with the other? Would it not, in reality, be the same as if such part had never been paid, or had been withheld in the first instance? * * * It is axiomatic, and universally accepted as a correct principle of law, that that which is prohibited from being done directly may not be accomplished by indirection. The people themselves, for reasons which they deemed to be wise and satisfactory, and for their own purposes, have thought it proper to withdraw from the field of taxation the official salaries of their judges. * * *
>
> * * * * *
>
> " * * * The holdings of a judge and his income, derived from other sources, are proper subjects of taxation. The plaintiff makes no objection to this,

but he does complain at the ruling of the defendant which singles out his official salary as a special object of taxation, contrary to the Constitution which he has solemnly sworn to support."

As has previously been pointed out herein, the framers of Section 1, Article III of the Constitution had before them a history of income tax legislation by the Colonies, and it must be held that, in making the prohibition against diminution all inclusive and without exception, it was their intent to exempt the compensation of Judges from an income tax such as the one here discussed. Further, as has been demonstrated, the framers, by the use of less than six words, could have exempted from the prohibition of Section 1, Article III, non-discriminatory income tax laws. Their failure to make this exemption clearly demonstrates their will that there should be no exception.

Thus we submit that Section 1, Article III of the Constitution has declared, by necessary implication, that the salaries of the Judges of the United States Courts should not be diminished by taxation.

The Appellant, in his brief, asserts that the compensation of Judge Woodrough ceased to be a salary and lost its identity, as such, immediately upon receipt by the Judge. Appellant, on page 11, asserts that the tax imposed is not upon the Judge's salary as such; that Section 22 (a) merely requires that it be included in gross income, along with all other items of income, from whatever source derived. He asserts that from the aggregate of these items various deductions are to be made, and only upon the net as thus determined is the tax computed. Appellant asserts that the tax involved is not a tax upon

any particular item that goes to make up the total of gross income.

An answer to this is contained in the opinion of Mr. Justice Parke in the case of *Gordy v. Dennis, supra,* wherein it is said:

> "Before its payment the salary was prospective income. *When it was paid it was income accruing due as salary, and after it was received it lost none of its quality as income derived from the State in the form of salary.* For the purpose of the income tax law its nature with reference to its origin never changed from the moment of its receipt, no matter when or how it was used, or kept, paid out or absorbed in a capital account. Whatever its liability to the imposition of an income tax became fixed as of the date of its accruing due and receipt.
>
> * * * * *
>
> "The notion that as soon as salary-income is received it is irretrievably commingled with the general income of the owner for the purpose of taxation so that the amount of the salary-income may not be separately considered as having been illegally included as part of the net income is, of course, untenable on principle and authority."

The fallacy in this contention of the Appellant is demonstrated by Mr. Justice Fields, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 1108, at page 1123:

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money

in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

"Admitting that this Act taxes the income of property *irrespective* of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution." (Emphasis ours.)

In *Lawrence v. Shaw,* 300 U. S. 245, 81 L. Ed. 623, this Court held pension moneys received under The World War Veterans Act of 1935 to be exempt from taxation, and that such exemption continued, *even though the pension check was converted into a bank deposit.* Mr. Chief Justice Hughes, in the opinion, at page 626 of the Lawyers Edition, said:

"Congress has declared that the payments of benefits by the Government shall be exempt not only before but 'after receipt by the beneficiary.' We cannot conceive that it was the intent of Congress that the veteran should lose the benefit of this immunity, which would attach to the moneys in his hands, by depositing the government warrants or checks in bank to be collected and credited in the usual manner. These payments are intended primarily for the maintenance and support of the veteran. To that end neither he nor his guardian is obliged to keep the moneys on his person or under his roof. As the immunity from taxation is continued after the payments are received, the usual methods of receipt

must be deemed available so that the amounts paid by the Government may be properly safeguarded and used as the needs of the veteran may require."

How much higher the protection of the compensation received by a Federal Judge by the Constitution against diminution, howsoever mechanized or characterized! Such protection, just as the exemption in the above decision, follows the salary as income until such time as such salary is converted into or invested in other forms of property.

III.

SECTION 22 (a), OF THE REVENUE ACTS OF 1932, 1934 AND 1936, IN ITS ASPECT AS AN AMENDMENT TO EXISTING JUDICIAL SALARY ACTS, IS VOID IN FAILING TO PROVIDE A FIXED COMPENSATION, AT STATED TIMES, FOR THE MEMBERS OF THE FEDERAL JUDICIARY, CONTRARY TO SECTION 1 OF ARTICLE III OF THE NATIONAL CONSTITUTION.

Section 22 (a) of the 1936 Revenue Act, considered in the initial or change of salary aspect of its dual character, provides:

> "In the case of Presidents of the United States and Judges of the courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; *and all acts fixing the compensation of such Presidents and Judges are hereby amended accordingly.*"

A.

Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936, Was Passed as, and Intended to Be, a Diminution of the Compensation of the Federal Judiciary, and Is Not a Mere Applying of the Tax Obligation to the Federal Judiciary as One of the Ordinary Duties of Citizens.

Appellant states that "at the very outset it should be observed that the tax is not imposed upon a Judge's salary as such" (p. 11).

Appellant further states:

> "It is not a tax upon any particular item that goes to make up the total of gross income." (p. 11.)

Also that—

> "In no sense can it be said that the tax is a charge against any of the sources that produce the gross income." (p. 11.)

However, in commenting on Section 22 (a) in its effect on Appellee's salary, Appellant, on page 37, states:

> "When he took office his compensation was fixed by law to be $12,500 minus the general income tax."

On page 36, Appellant states:

> "Thus, the provisions of law fixing $12,500 as the annual salary of Circuit Judges in the Eighth Circuit * * * were unambiguously limited by Section 22-a of the 1932 Act."

On page 37, Appellant states:

> "At the time he took office the annual salary as fixed by Congress was $12,500, minus the tax imposed by law."

Section 22 (a), after providing that the compensation of Judges of the United States Courts, after June 6,

1932, shall include their compensation in gross income, provides:

> **"And all Acts fixing the compensation of such Presidents and Judges are hereby amended accordingly."**

The intention of Congress is revealed by the report of the Finance Committee of the Senate on the Bill (H. R. 10263) as follows:

> "This section has been amended to make it clear that compensation of the President of the United States and of the Judges of the Courts of the United States taking office after the date of the enactment of this Bill is to be included in gross income. To effectuate that purpose in cases in which the compensation for any such office has been provided in Acts antedating the present Bill, it is provided that all Acts fixing the compensation of such President and Judges are by this provision amended so that **in every case such compensation will be reduced by the amount of the Federal Income Tax resulting from the inclusion in gross income of the amount of such compensation.**" (Emphasis ours.)

Prior to the passage of this Act, this Court, in the case of *Miles v. Graham*, had held that Judges of the United States Courts, appointed after the passage of the 1918 Revenue Act, were not required to include their salaries in returning their gross income. That case likewise held that "the power of Congress **definitely to fix the compensation** to be received at stated intervals by Judges thereafter appointed is clear." Obviously, this is an attempt to circumvent the decisions in *Evans v. Gore* and *Miles v. Graham*. *Manifestly, the very intent of the Act is to accomplish a reduction of the salaries of the United States Circuit Judges from the figure $12,500*

to $12,500 minus the tax. This must be so, because the Act itself, in express terms, attempts to amend all Acts fixing the compensation of such Judges.

Prior to the passage of the 1932, 1934 and 1936 Revenue Acts, the corresponding section of the Revenue Acts did not purport to amend the Acts fixing the compensation of Judges of the United States Courts, and under the decisions of *Evans v. Gore* and *Miles v. Graham,* Judges of the United States Courts were not required to pay income tax on their salaries. Therefore, Congress, with the specific intention of subjecting those salaries to an income tax, sought, in the Revenue Act of 1932, in Section 22 (a) thereof, to amend prior Acts fixing compensation of Judges.

In the two cases cited above, this Court had held that a Revenue Act requiring the inclusion of the salaries of the Judges of the United States Courts in their gross income, and the payment of an income tax thereon, *was a diminution of the compensation of those Judges, and, therefore, a violation of Section 1, of Article III, of the Constitution,*—this contrary to the contention of the Government, then made, that it was not a diminution of the compensation of the Judges, but was a tax on the net income of the Judges from all sources, and was not directed at the Judges' salaries as such.

It is apparent that Section 22 (a) of the Revenue Act of 1936 specifically singles out the compensation of the Judges and directly seeks to reduce their salaries, by requiring the Judges to pay an income tax thereon. *Thus, the compensation of Judges is not indirectly diminished but is directly, by express terms, diminished by Section 22 (a).*

If the majority opinions, in the cases of *Evans v. Gore* and *Miles v. Graham*, were correct in construing the earlier Revenue Acts, then, a fortiori, in construing Section 22 (a) of the 1936 Revenue Act, this Court must, in our judgment, come to the inevitable conclusion that the Section involved in *this case* does, without doubt, expressly levy a tax upon the compensation of the Judges of the United States Courts, and *does diminish the compensation, in violation of Section 1, of Article III*, of the Constitution of the United States.

B.

Such Amendment, by Reason of the Variables Inherent in the Application of the Income Tax, Would Create Disproportionate, Indefinite and Dissimilar Compensations for the Various Members of the Federal Judiciary.

Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936, purporting to amend the statutes fixing the compensation of the Judges of the United States Courts, does not provide for a fixed, definite and certain compensation payable at stated times, as required by Section 1 of Article III of the Constitution and is, therefore, void as an Act amending the Act fixing the salary of Judges.

If the provision of Section 22 (a) is valid, the law fixing the salaries of Judges taking office since June 6, 1932, has been amended so that their compensation no longer is definite and certain and payable at stated times. A Judge's salary will now vary with the date of his appointment, his other income, his credits, his deductions, and the future conscience or caprice of Congress. A Judge's salary will vary from year to year. It will be as uncertain as Selden's "equity that varies with the length

of the chancellor's foot." In all probability no two Judges appointed subsequent to June 6, 1932, will receive the same salary and none of them will receive as much as Judges appointed prior to that date. This anomalous state of the law does not accord with the Constitution or the decisions of the Supreme Court. Obviously, the authors of the Constitution believed that an independent, courageous Judiciary transcended in importance any revenue that could be derived from taxing the salaries of the Judges. If the compensation of Judges is more than it should be, Congress should reduce it by forthright action and not by indirect legislation that produces an uncertainty and a disparity that never can be satisfactory.

Each and Every Word of Constitution to Be Given Effect

In *Williams v. United States,* 289 U. S. 553, 77 L. Ed. 1372, this Court reiterates the rule that in expounding the Constitution, every word must have its due force and appropriate meaning. Mr. Justice Sutherland, in delivering the opinion of the Court, said:

* * * * *

> "The use of the word 'all' in some cases, and its omission in others, cannot be regarded as accidental, under the rule stated in an early case, Holmes v. Jennison, 14 Pet. 540, 570, 571, 10 L. ed. 579, 594, 595, and ever since fully accepted, that—'*In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning;* for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the

high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.' See also Myers v. United States, 272 U. S. 52, 151, 71 L. ed. 160, 180, 47 S. Ct. 21." (Emphasis ours.)

In *Cohens v. Virginia*, 6 Wheat. 262, 416, 5 L. *Ed.* 257, 294, the Court said:

"The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. * * *"

In *Wright v. United States*, 302 U. S. 583, 82 L. Ed. 439, the Court said in opinion by Mr. Chief Justice Hughes—

"To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. 'In expounding the Constitution of the United States,' said Chief Justice Taney in Holmes v. Jennison, 14 Pet. 540, 570, 571, 10 L. Ed. 579, 594, 595, 'every word must have its due force, and appropriate meaning; * * * See also Martin v. Hunter, 1 Wheat. 304, 333, 334, 4 L. Ed. 97, 104, 105; Ogden v. Saunders, 12 Wheat. 213, 316, 6 L. Ed. 606, 641; Myers v. United States, 272 U. S. 52, 151, 71 L. Ed. 160, 180, 47 S. Ct. 21; Williams v. United States, 289 U. S. 553, 572, 573, 77 L. Ed. 1372, 1379, 1380, 53 S. Ct. 751."

To similar effect see *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 477, and *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

Constitution Provides for a Fixed and Definite Compensation—Miles v. Graham

In line with the above, it is apparent that the article "a," used before the word "compensation," indicates that the language of the Section means and contemplates a fixed, definited and certain compensation. As was said in *Miles v. Graham, supra*:

> "The words and history of the clause indicate that the purpose was to impose upon Congress the duty *definitely* to declare what sum shall be received by each Judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office."

In the case of *Benedict v. United States*, 176 U. S. 357, 44 L. Ed. 503, Mr. Justice Brown, in the opinion says:

> "The case in reality turns upon the meaning of the word 'salary' as used in Sec. 714. The word 'salary' may be defined generally as a *fixed* annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. (Citing cases.)
>
> * * * * *
>
> "It is a compensation which cannot be diminished during the continuance of the incumbent in office and of which he cannot be deprived except by death, resignation or impeachment."

If Congress, in 1932, had *in a Salary Act* provided that the salaries of Judges of the Circuit Court of Appeals thereafter appointed should be the sum of $12,500, less such a percentage thereof as Congress should from time to time thereafter specify, without in said Act fixing

a definite percentage, **with one accord it would be admitted that such an Act was void for the reason that it did not provide for a fixed compensation payable at stated times.** It is apparent that there would be no distinction between such an Act and Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936 wherein a diminution of the Judges' salaries from year to year may be effected through the vehicle of income taxes as an amendment to the Salary Act.

Taxation Varies
Judicial Compensation

In *Nichols v. Coolidge,* 274 U. S. 531, 71 L. Ed. 1184, the Court held void a provision of the 1919 Revenue Act requiring the inclusion in gross estate of the decedent of all property disposed of during lifetime but the transfer of which was to take effect after death.

In characterizing the statute as so grossly arbitrary as to violate the Fifth Amendment, the Court, *inter alia,* said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. * * * Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died."

The analogy to the facts in the case at bar is evident in that in the case at bar the income of the Judges taxed is made uncertain because of past occurrences beyond their present control, to-wit, the afore-enumerated variables or causes for variables under the Income Tax Act.

The cumulative effect of requiring the Federal Judge to include as a part of the gross income his salary as a Judge would inevitably retroactively disarrange and change the quantum of the monthly payments theretofore received. Almost certainly no two Judges, although occupying the same judicial station and doing the same work would receive the same net compensation. Yet, Section 1 of Article III of the Constitution specifically provides that a Federal Judge shall receive *"a compensation"* and that such compensation shall be paid *"at stated times."*

Furthermore, the Congress of the United States has the power, and such power has been exercised, to change the rates of taxation, even after the close of a calendar year. Such a power, if exercised, and if a change were so made, would again affect the net amount of the salary of a Federal Judge which he had received during the calendar year. *Welch v. Henry,* —— U. S. ——, 83 L. Ed. 99 (adv. ops.), decided November 1, 1938.

In the case of *Miles v. Graham, supra,* the Court said:

> "The words and history of the clause (Sec. 1, Art. III) indicate that the purpose was to impose upon Congress the duty **definitely to declare what sum shall be received by each Judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office.**" (Emphasis ours.)

As to the effect of the taxing Act on the law fixing salaries for Judges, the Court in the *Graham Case* further said:

> "The taxing act became a law prior to the statute prescribing salaries for Judges of the Court of

Claims, but if the dates were reversed it would be impossible to construe the former as an amendment which reduced the salaries by the amount of the tax imposed."

It might be inferred from the sentence last quoted that the defect in the Act of 1918 was the failure of Congress expressly to make it an amendment to the law providing for the salaries of Judges, but the Court in continuing pointed out another defect by saying:

> "No judge is required to pay a definite percentage of his salary, but all are commanded to return, as part of 'gross income' 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemption varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all Judges to return their compensation as an item of 'gross income' and to tax this as other salaries. This is forbidden by the Constitution.
>
> "The power of Congress definitely to fix the compensation to be received at stated intervals by Judges thereafter appointed is clear."

To be explicit, the language last quoted means that by requiring Judges to include their salary in gross income their compensation *no longer is definitely fixed and payable at stated times as required by the Constitution.* The Court concludes with this definite, positive statement:

> "It is equally clear, we think, that there is no power to tax a Judge of a Court of the United States on account of the salary **prescribed for him** by law." (Emphasis ours.)

The Court broadened the scope of the *Evans Case* to meet the exigencies of the *Graham Case.* Judge Evans

took office before the particular taxing act was enacted, while Judge Graham was appointed after the date of the enactment. The *Evans Case* was decided on the theory that an income tax imposed on the compensation of a Judge diminished his stipend guaranteed by the Constitution. And the *Graham Case* was decided on the hypothesis that the Constitution not only protects a Judge against the diminution of his salary but in addition, imposes an affirmative duty on Congress to guarantee him a definite compensation, payable at stated times, which shall not be diminished.

The *Evans Case* held that Congress may not take away a part of a Judge's salary by an income tax passed after his appointment, while the *Graham Case* held that a Judge must be paid the full salary provided in the law under which he was appointed and which expressly stated the compensation for the Judges of his station, and that it cannot be varied or rendered uncertain by subjecting it to an income tax even though such taxing act was in existence at the time of his appointment.

The foregoing becomes manifest from the following portion of the opinion of Mr. Justice McReynolds, when considered with relation to the fact that the Income Taxing Act was enacted *before* Judge Graham took office:

> "* * * The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of Evans v. Gore."

We are not quite certain that we understand the Government's attitude as to whether or not, under the 1932 Revenue Act and subsequent modifications thereof, all Judges appointed after June 6, 1932, may be subjected not only to the 1932 Revenue Act but to all subsequent

modifications thereof, including any increased taxation percentages. We believe the Government contends that the Judges appointed after June 6, 1932, are, in fact, subject not only to the 1932 level of tax rates but to such level of increased tax rates as may be evolved in later Revenue Acts, and that such was the intent of Congress in enacting Section 22 (a) of the 1932 Revenue Act.

But the Government does contend that, irrespective of the soundness of the contention last stated, nevertheless, Judge Woodrough is bound by not only the 1932 Revenue Act but the 1934 and 1936 Revenue Acts, because his tax burden has not been increased under the 1934 or 1936 Revenue Acts. However, as to the Circuit Court of Appeals Judges, having net income in excess of $26,000, their tax burdens would be increased under the 1934 and 1936 Revenue Acts over and above what they would have been under the 1932 Revenue Act. In consequence, and under this secondary assumption, concerning the Government's attitude, the situation would obtain that Judges of the Circuit Court of Appeals, enjoying the same rank and doing the same work and having the same stipulated compensation under the Judiciary Salary Act, through the application of the 1934 and 1936 Revenue Acts, that is, the different schedules therein applicable, would receive ultimately different compensation as Judges, dependent on whether or not their net incomes exceeded or fell below $26,000 per annum.

This would be a further differentiation in their compensation as Judges, aside from, and in addition to the differences occasioned by the variables above described.

Uncertainty of Compensation Resulting From Section 22 (a)

How, Then, Does Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936, Purporting to Amend the Judicial Salary Act, Violate and Contravene Section 1 of Article III of the Constitution, on the Ground That No Fixed Compensation Is Provided For and Such Compensation Is Not Payable at Stated Times?

Article III, Section 1 of the Constitution as construed by the Courts makes three requirements:

1. That the Judges shall receive a fixed compensation.

2. That such fixed compensation shall be paid to them at stated times.

3. That such fixed compensation shall not be diminished during their continuance in office.

The Salary Act, Title 28, Sec. 213, U. S. C., provides that each Circuit Judge shall receive a salary of $12,500 a year, payable monthly. Therefore, Judge Woodrough, as a Circuit Judge under the Salary Act, received a salary of $1,041.66 payable to him each month.

Assuming, arguendo, that Section 22 (a) of the Revenue Acts of 1932, 1934 and 1936 do not contravene the provision of Section 1 of Article III of the Constitution, prohibiting the diminution of the Judge's salary during his continuance in office, nevertheless, Section 22 (a) of the Revenue Act of 1936 violated and contravened the other two express requirements:

(a) That the Federal Judges shall receive "*a compensation*"—which in the ordinary use of the words means a fixed compensation.

(b) That such fixed compensation for Federal Judges shall be paid *"at stated times."*

Under the operations of Section 22 (a) of the Revenue Act of 1936, by requiring a Judge's compensation to be included in gross income, such Judge's compensation would be neither a fixed compensation nor a compensation payable at stated times, because:

(a) A Federal Circuit Judge would initially receive, during the calendar year, a salary of $1,041.66 per month and which would aggregate $12,500.00 per year.

(b) After he had been so paid such fixed monthly compensation of $1,041.66 at stated times, i. e. for each month of the calendar year, and after the calendar year had closed, the United States Government, under said Section 22 (a), would seek to recover a part of the judicial compensation so received.

(c) A Federal Judge would not know what his net salary would be until after the close of the calendar year, because a judge is not required to pay a definite percentage of his salary, but all Judges are commanded to return, as a part of "gross income," the compensation received as such from the United States.

(d) The amount of the Judge's salary would therefore be dependent upon various deductions, credits and personal exemptions allowed against gross income, none of which in their respective, actual applications or amounts, would be definitely determinable until the expiration of the particular calendar-taxable-year.

The net amount of the Judge's salary would depend upon:

1. Other income which he would have from other sources.

2. Deduction for interest paid.

3. Deduction for State, County and City taxes paid on properties which may be owned by the Judge.

4. Losses by fire, storm, etc.

5. Bad debts.

6. Depreciation on any property which he might own.

7. Contributions which he might make.

8. Personal exemption, depending upon whether he is single or married.

9. Credit for dependents.

It can be readily seen that a Federal Judge would not know, *and in fact, could not know,* until the end of the calendar year what such respective deductions, credits and personal exemption would be or would aggrega' For example, a Judge might marry during the calendar year, in which event his personal exemption would increase. If married during the calendar year, his wife might die before the end of the calendar year, and in which event his personal exemption would decrease. Children might be born during the calendar year, in which event his credit for dependents would increase. Children might die during the calendar year, and in which event his credit for dependents would decrease. Similarly, the deductions allowed to him under the Revenue Act would vary during the calendar year, depending upon whether or not he was required to borrow money, pay taxes, suffer losses by fire, storm, or otherwise, or make contributions to charity.

All of these variables would be proper in the computation of an Income Tax for Revenue Act purposes. However, these variables by Section 22 (a) are made the yardstick of a judicial salary **because this Revenue Act happens to be also an amendment to Judicial Salary Acts.** Consequently, a judicial salary is measured by the weathervane of considerations appropriate only to an Income Tax law, but wholly inappropriate to, and, in fact, violating, the principles here expounded underlying a Salary Law for the Judiciary.

C.

Such Amendment Would Create Invidious Distinctions as Between Members of Any Given Branch of the Federal Judiciary and Thereby Produce an Unthinkable and Reprehensible Disparity Between Judges of the Same Rank, Dignity and Jurisdiction.

If *Evans v. Gore, supra,* were not the law, then under the 1936 Revenue Act, we would be confronted with an anomaly which affronts not only the judicial sense of what is right and proper, but even the most elemental instincts of the mere layman, because of the resulting invidious distinctions as between Judges possessing the same powers and jurisdiction and clothed with equal rank and dignity. Consider that upon the various Federal benches of the Nation would then sit Judges equal in every respect, except in their compensation. The judicial and lay mind is repelled by the very thought that invidious distinctions between members of a Court, who are by the Constitution equal in dignity and clothed with a parity of judicial power, could possibly obtain. No right-thinking individual, much less a lawmaker, could ever intend to split a judicial tribunal composed of officers

of equal rank and dignity and discharging the same duties and wielding equal power, into an heterogeneous body with some members remunerated upon one basis and other members remunerated upon another basis. It opposes that sense of uniformity and equality of treatment and fair play, which must inhere in every legislative enactment.

The foregoing finds expression in many authorities.

Thus, in *Commonwealth v. Mathues*, 210 Pa. 372, 59 Atl. 961, 981, the Court said:

> "* * * There can be but *one* adequate *compensation for each of the judges of the same court*, because, no matter how much greater the experience or learning of one member of it may be than that of another, there can be no difference in the actual performance of the judicial functions. The judicial genius who brings the highest order of learning and ability to bear in such performance stands upon the same level with the merest tyro of a judge, whose learning and ability in comparison may be as the shadow is to the substance. It is futile to contend that there may be different adequate compensations for different members of the same court." (Emphasis ours.)

In *Beach v. Kent*, 142 Mich. 347, 105 N. W. 867, 869, the Court likewise said:

> "* * * Can they fix one salary for one circuit judge and another and different salary for the other circuit judge in Saginaw county? * * * The powers and duties of the two circuit judges in Saginaw county are fixed and determined by the Constitution and general laws of the state, and are identical. * * * "

In 15 R. C. L., "Judges", Section 14, Page 525, the author says:

> " * * * Inequality in the matter of compensation of judges exercising the same jurisdiction has been condemned * * * ."

Attorney General Hoar, in 13 Ops. Atty. Gen. 161, applied the foregoing doctrine to the subject of an income tax upon the salary of a Judge, saying:

> " * * * And, in the case of the judges, as the amount of income tax laid upon salary should be varied from time to time, one judge might be liable only to the amount of part of the income tax which the law imposed on salaries generally, and different members of the same court would be receiving different rates of compensation."

See also *Henderson v. Koenig,* 168 Mo. 356, 68 S. W. 72.

This same fundamental requirement of equality of compensation, in such like circumstances, is applied in many cases dealing with Judges of the Federal Court, underlying holdings that their compensation cannot be varied: by reason of resignation (*Benedict v. United States,* 176 U. S. 357, 44 L. Ed. 503; or retirement (*Booth v. United States,* 291 U. S. 339, 78 L. Ed. 836); or occupation of judicial offices "of equal rank and power with those of other inferior Courts of the Federal System" (*O'Donoghue v. United States,* 289 U. S. 516, 77 L. Ed. 1356); and ascent to a Federal judicial office after the passage of an income tax act applicable to the emoluments thereof (*Miles v. Graham,* 268 U. S. 501, 69 L. Ed. 1067).

A contrary interpretation would ascribe to Congress an intention wholly inconsistent with right-thinking, foreign to the fundamental conception that created the National Courts, and inimical to the ideals which surround

and ennoble this important branch of our Government. In its application to this august body alone, the creation of such invidious distinctions would subtract from the respect in which each and every member of this Honorable Court is held by every right-thinking citizen. Such an impossible and reprehensible result cannot possibly be envisaged. It would rend asunder the members of each of the Federal Courts into unequal divisions, disparaging that uniformity of dignity and power surrounding the members of each branch of the Federal Courts. It would be, indeed, ignoble.

Even if the Evans vs. Gore Rule Did Not Obtain, Section 22-(a) of the 1936 Revenue Act, in Its Aspect as a Salary Act, Would Be Unconstitutional.

As indicated, the contention here made, that the 1936 Act is unconstitutional as a Salary Act, in failing to provide a fixed compensation, payable at stated times, obtains, irrespective of the existence or non-existence of the *Evans v. Gore* rule, which primarily inhibits a diminution of judicial compensation; whereas, the defect here considered is that the 1936 Act renders judicial compensation uncertain.

IV.

SECTION 22 (a), OF THE REVENUE ACTS OF 1932, 1934 AND 1936, IN ITS ASPECT AS AN AMENDMENT TO REVENUE ACTS RELATING TO INCOME TAXES, IS VOID IN ITS APPLICATION TO MEMBERS OF THE FEDERAL JUDICIARY BECAUSE IT PROPERLY CREATES A CLASSIFICATION OF FEDERAL JUDGES AS SUCH, BUT IMPROPERLY CREATES A CLASSIFICATION AS BETWEEN VARIOUS FEDERAL JUDGES OF THE SAME RANK,—THOSE APPOINTED BEFORE AND THOSE APPOINTED AFTER JUNE 6, 1932,—WITHOUT ANY RATIONAL DISTINCTION THEREFOR, SO FAR AS THE IMPOSITION OF TAXES UPON SUCH CLASS IS CONCERNED.

Section 22 (a) of the 1936 Revenue Act, considered in the other or *taxing* aspect of its *dual character*, provides:

> "In the case of Presidents of the United States and Judges of courts of the United States taking office after June 6, 1932, *the compensation received as such shall be included in gross income;* and all acts fixing the compensation of such Presidents and Judges are hereby amended accordingly."

Section 22 (a) of the Revenue Act of 1936, Because of Unlawful Discrimination in the Classification of Judges Subjected to the Act, Is Unconstitutional, as in Violation of the Fifth Amendment, Inhibiting the Taking of Property Without Due Process.

It is our contention, as elsewhere in this Brief set forth, that, assuming a right to tax Judges at all, a classification of Judges as an *entire group or segment* of the People, would meet the requirements of the law governing classifications for taxation purposes. But we deny

that there is any rationality, or justification whatsoever, for a classification, *inter se*, of Judges of the United States Courts for the purpose of taxation, as provided in the Revenue Act of 1936.

Such a classification is obviously arbitrary, and violative of fundamental conceptions of justice, and wanting in any basis of classification because of subjecting to income tax charges a particular number of a given class of Judges, and, by the non-inclusion thereof, exempting the remaining Judges of the same identical class. And all of this is done notwithstanding that, in their respective ranks, such as District Judges, and Circuit Court of Appeals Judges, the two groups of Judges—those taxed and those not taxed—*are occupying the same stations in the Government's service, are doing identical work, and, absent the offending classification in the 1932 and subsequent Acts, are receiving the same stipulated compensation per rank.* (Title 28, Sec. 213, U. S. C.)

Section 22 (a) of the 1936 Revenue Act makes no pretense whatsoever of indicating a justification for its arbitrary classification of judges appointed after June 6, 1932.

In other words, not any differentiation in status, functions, or stipulated compensation, or other attributes whatsoever, was seen, or can be claimed, as between the two groups of Judges, those appointed prior to June 6, 1932, and those appointed thereafter.

The only distinction suggested, the accidents of the dates of appointments, reflects no difference in the positions, or in the work of, or in the stipulated compensation received by the respective ranks of Judges, and as to each of which ranks the same arbitrary classification is made applicable.

The bald facts of the situation point to the inevitable conclusion that Section 22 (a) of the 1936 Revenue Act is not only violative of all legal conceptions of fair play (*Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U. S. 35, 67 L. Ed. 115), but, in addition, is an attempted subversion of established Constitutional provisions and concepts (*U. S. v. Butler*, 297 U. S. 1, 80 L. Ed. 477, and Child Labor Tax Case; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 819).

The utterly negligible amount of revenue possible in the premises, especially when weighed against the fundamental Constitutional principle jeopardized—the independence of the Judiciary—is conclusive of these judgments.

That a Federal statute, enacted under the taxing power, may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment has been repeatedly determined by this Court.

In *Heiner v. Donnan*, 285 U. S. 312, 76 L. Ed. 772, a Federal statute, declaring gifts, made within two years of death, should be conclusively presumed to have been given in contemplation of death, and, therefore, subject to the Federal Inheritance Tax Laws, was declared violative of the Fifth Amendment.

Speaking to the issue, the Court said:

> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. *The restraint imposed upon legislation by the due process clauses of the two amendments is the same.* Coolidge v. Long, 282 U. S. 582, 596, 75 L. Ed. 562, 566. *That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment*

is settled. Nichols v. Coolidge, 274 U. S. 531, 542, 71 L. Ed. 1184, 1192; Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 25, 60 L. Ed. 493, 504; Tyler v. United States, supra, 281 U. S. 504, 74 L. Ed. 998." (Emphasis ours.)

In *Burnet v. Brooks,* 288 U. S. 378, 77 L. Ed. 844, in sustaining a Federal Estate Tax on intangible property of a non-resident decedent, this Court, in reviewing the principles involved, again recognized the restrictions upon the taxing power of Congress, afore-quoted from the *Heiner decision.*

Attention is invited to the statement of the principle immediately applicable to the patently unreasonable classification of Judges under discussion, when the Court in the *Burnet Case* expressed that there might be "* * * confiscatory or arbitrary legislation inconsistent with the *fundamental conceptions of justice* which are *embodied in the due process clause* for the protection of life, liberty and property of all persons * * *."

In *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 79 L. Ed. 1593, the Court, in holding the Frazier-Lemke Bankruptcy Act invalid, again adverted to the general limitations on Congressional action of the Fifth Amendment. In a valuable footnote, Mr. Justice Brandeis included in the enumeration of powers subject to the ultimate application of the Fifth Amendment, the following:

"* * * The power to tax, United States v. Baltimore & O. R. Co., 17 Wall. 322, 21 L. ed. 597; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; Nichols v. Coolidge, 274 U. S. 531, 542, 71 L. ed. 1184, 1192, 47 S. Ct. 710, 52 A. L. R. 1081; Blodgett v. Holden, 275 U. S. 142, 147, 72 L. ed. 206, 210, 48 S. Ct. 105; Barclay & Co. v. Edwards,

267 U. S. 442, 450, 69 L. ed. 703, 706, 45 S. Ct. 135, 348; Heiner v. Donnan, 285 U. S. 312, 326, 76 L. ed. 772, 779, 52 S. Ct. 358. * * *"

In *Nichols v. Coolidge*, 274 U. S. 531, 71 L. Ed. 1184, the Court, in holding invalid a Federal statute, imposing a gift tax,—Paragraph 402c of the Revenue Act of 1919, requiring the inclusion in the gross estate of a decedent, for purposes of estate taxation, the value of property transferred by decedent prior to its passage, merely because the conveyance was intended to take effect in enjoyment at or after death,—as void on account of arbitrariness and capriciousness, spoke to the issue as follows:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See Frew v. Bowers (C. C. A. 2d) 12 F. (2d) 625."

We suggest the analogy of the principles afore-recited to the sole and arbitrary basis of classification of Judges in the 1936 Revenue Act, to-wit, the accidents of their dates of appointment.

Continuing, the Court added:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment. Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917 B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747."

In *Coolidge v. Long,* 282 U. S. 582, 75 L. Ed. 562, 566, this Court, in voiding a provision of the Massachusetts State Inheritance Tax, in the opinion, through Mr. Justice Butler, by way of analogy, points out the limitations upon the taxing power of Congress and the decisions demonstrating such restrictions, on the ground that they were "arbitrary and repugnant to the due process clause of the 5th Amendment," and concludes with the statement that—

"* * * The States are similarly restrained by the due process clause of the 14th Amendment."

The Court thus again recites that the United States, as well as the several States, are similarly circumscribed in the exertion of the taxing power against arbitrariness of classification.

In *Brushaber vs. Union Pacific Railroad Company,* 240 U. S. 1, 60 L. Ed. 493, the Court, in sustaining the 1913 Income Tax, and in considering the urged invalidity of the Act because of unreasonable exemptions, recognized possible violations of the Fifth Amendment upon such grounds in the following language:

"And no change in the situation here would arise arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary

> as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; *or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*" (Emphasis ours.)

Again, in *Steward Machine Company v. Davis*, 301 U. S. 548, 81 L. Ed. 1279, in sustaining the Social Security Act, the Court adverted to the fact that tyrannical or arbitrary classifications would occasion invalidity under the Fifth Amendment, and answering the contention of urged discriminations in the Act there under consideration, as for instance, employers of less than eight employes, agricultural labor, etc., the Court said:

> "The classification and exemptions directed by the statute now in controversy have support in consideration of policy and practical convenience that cannot be condemned as arbitrary. * * * The Act of Congress is therefore valid, so far at least, as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."

The suggestion that a difference obtains as between the two groups of Judges, those taxed and those not taxed by the 1936 Revenue Act, in that one group was appointed before a particular day, June 6, 1932, and the other group appointed thereafter, does not appeal to one's reasoning as reflecting any reasonable or substantive difference and comes within the criticism of this Court in *Gulf, Colorado & Santa Fe Railway Company v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, wherein the Texas statute imposing attorneys' fees costs upon railway corporations alone was held unconstitutional. The Court, speaking to the issue, said:

"But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. Ed. 107; Walston v. Nevin, 128 U. S. 578, 32 L. Ed. 544; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Pacific Express Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810; Giozza v. Tiernan, 148 U. S. 657, 37 L. Ed. 599; Columbus S. R. Co. v. Wright, 151 U. S. 470, 38 L. Ed. 238; Marshant v. Pennsylvania R. Co., 153 U. S. 380, 38 L. Ed. 751; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1), yet it is equally true that such classification cannot be made arbitrarily. **The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not.** It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. *These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.*" (Emphasis ours.)

While this excerpt was reviewing the Fourteenth Amendment, the reasoning invoked is nevertheless applicable to a consideration of the reasonableness of a classification under a Federal enactment, tested by the Fifth Amendment. (*Heiner v. Donnan, supra.*)

In *61 Corpus Juris*, "Taxation," Section 2307, page 1564, the author says:

> "A statute making an arbitrary classification, however, between incomes to be taxed and those in part or in whole exempt from or not subject to taxation is unconstitutional."

The text writers and the authorities agree generally that—

> "* * * Discriminations between members of the same natural class have been uniformly condemned."
>
> *Judson on Taxation,* Section 528, page 587.

Similarly in 26 R. C. L., "Taxation," Section 216, the author says:

> "* * * There can be no discrimination between subjects which properly belong to the same class. The right of classification is allowed in order to avoid or correct inaccuracies, never to create them."

In *Royster Guano Company v. Virginia,* 253 U. S. 412, 64 L. Ed. 989, the Court held that the exemption of domestic corporations doing business outside the state, but none within the state, except the holding of stockholders' meetings, from the payment of any income tax, while domestic corporations doing business both within and without the state are required to pay a tax on income derived from their business transacted outside the state, as well as upon the income derived from that done within the state, amounts to an arbitrary discrimination forbidden by the equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

After adverting to the discretion in classifications for the purpose of taxation, the Court indicated limitations in the following language:

> "Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

The illusory status here referred to was the arbitrary distinction, without a difference, sought to be made between Virginia corporations, according to where their respective volumes of business obtained.

In *Board of Commissioners of Johnson County v. Johnson*, 89 N. E. (Ind.) 590, it is said at page 594:

> "But taxation is not uniform, or equal, when it applies to a portion of a class, and omits a portion."

In *Clark v. Maxwell*, 150 S. E. (N. C.) 190, Plaintiff was allowed to recover a tax paid under protest, on the ground that the State Statute imposing the tax was not uniform "* * * in that said license tax exempts the amount of tax imposed by other statutes upon persons engaged in the same business. * * *".

The Court found that as to this particular character of tax the North Carolina Constitution contained no uniformity provision. But the Court then said:

> "* * * It is well settled, however, that a tax imposed or authorized by the General Assembly on trades, professions, franchises, *or incomes*, not uniform, as properly understood, cannot be sustained, for the reason that *such tax is inconsistent with natural justice.*" (Emphasis ours.)

This case was affirmed, Per Curiam, by the United States Supreme Court in 282 U. S. 812, 75 L. Ed. 757.

In *In re Gross Production Tax of Wolverine Oil Co.*, 53 Okla. 24, 154 Pac. 362 (1916), the Court said:

> "The principles of equality and uniformity * * * require * * * that the burden of taxation shall be imposed equally upon all those engaged in the same avocation * * *."

In *In Re Watson*, 97 N. W. (S. D.) 463, the Court said:

> "* * * The burden imposed shall fall alike on all persons who are in substantially the same situation—a rule generally recognized, even in the absence of an express constitutional requirement as to uniformity."

We submit that Section 22 (a) of the Revenue Act of 1936, in arbitrarily classifying Judges as subject or as not subject to the imposition of the Act, dependent on whether their appointments were, accidentally, before or after the particular date of the Act, June 6, 1932, is grossly discriminatory against the Judges subjected to the imposition of the tax, is utterly wanting in basis for classification, and directly occasions such a patent inequality as to be an arbitrary taking of property in violation of the Fifth Amendment.

The anomalous condition reflected by Section 22 (a) of the 1936 Revenue Act, in accomplishing, if valid, a different ultimate basis of compensation, according to their dates of appointment, for Judges sitting beside each other, of like rank and dignity, and doing like work, is accentuated by the further fact that, as Income Tax schedules change from period to period, even the respective compensations, less Income Tax, of that particular number of the Judges subjected to the 1932 Income Tax Act, and succeeding Revenue Acts, will be further differentiated, in that the ultimate compensations will differ as often as the schedules in the Revenue Acts change and Judges continue to be appointed. Speaking of the general effect here discussed, Attorney General Hoar, in his letter of October 23, 1869, to Secretary of the Treasury Boutwell, said:

> "And, in the case of the judges, as the amount of income tax laid upon salary should be varied from time to time, one judge might be liable only to the

amount of part of the income tax which the law imposed on salaries generally, and different members of the same court would be receiving different rates of compensation."

For the reasons here stated, we respectfully submit that Section 22 (a) of the Revenue Act of 1936 is void and unconstitutional, as premised on an arbitrary, and wholly unreasonable classification, in violation of the provision of Article V of the Amendments to the Constitution, inhibiting the taking of property without due process.

In consequence, there is not any other issue properly before the Court. That is to say, the contention here submitted, if sustained by the Court, would also terminate this law suit in an affirmance of the judgment in favor of Judge Woodrough, irrespective of the existence or non-existence of the *Evans v. Gore* rule.

Appellant asks that the *Evans v. Gore* rule be declared non-existent.

In such situation, so urged, all Federal Judges would be subject to tax. But as, under the 1936 Revenue Act, only a segment of all Judges—those appointed after June 6, 1932—are, in fact, taxed, the result would be an obvious, arbitrary and unreasonable discrimination, inhibited by the Due Process clause of the Fifth Amendment.

Assuming, conversely, the *Evans v. Gore* rule is in effect; then, through the evasive medium of an alleged amendment to the Salary Act, the identical obvious and arbitrary discrimination is sought to be evolved. And yet the very mechanism is made a part of an Income Tax Law, a procedure condemned both in *Evans v. Gore* and *Miles v. Graham*. In other words, what could not be done directly has been sought to be done indirectly, which contravenes the principle announced by this Court in *Craig v. Missouri, supra,* when the Court said:

"That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so."

Even if the Evans vs. Gore Rule Did Not Obtain, Section 22 (a) of the 1936 Revenue Act as a Taxing Act Would Be Unconstitutional.

The maximum of anomalies would be reached in this particular situation, if virtue were found in the Government's contention that the *Evans v. Gore* rule should be reconsidered and overruled.

In the situation which would then obtain there would be a legal right to tax the incomes of all Judges, but with a statute—in this case the Revenue Act of 1936—applicable to Judge Woodrough and the other Judges appointed after June 6, 1932, imposing upon them an Income Tax, and by the omission therefrom, exempting other Judges of like rank, duties and stipulated compensation, who fortunately, yet fortuitously, received their appointments prior to June 6, 1932.

Manifestly, as heretofore demonstrated, this would violate the elemental limitation against discriminatory classification, inherent in the Fifth Amendment, and, beyond peradventure of a doubt, would also violate the intent of the Makers of our Constitution.

SUMMATION AND CONCLUSION

(a) The *Evans v. Gore* rule is the law of the land and is as sound and essential today for the security of the form of government contemplated and provided by the makers of the Constitution, as when promulgated. (P. 21, *et seq.*)

(b) Assuming the *Evans v. Gore* rule in continuing force and effect, Section 22 (a) of the 1936 Revenue Act is unconstitutional for the following reasons:

1. It violates Section 1 of Article III of the Constitution, forbidding the diminution of the compensation of Judges during their continuance in office. (P. 21, *et seq.*)

2. It violates the rule implicit in Articles I, II and III of the Constitution, contemplating and providing for three separate departments of Government, and each department to be independent of the other departments, in that it, in effect, would subject the Judiciary to the taxing power of the Legislative Department, and the incident resulting coercive influence. (P. 39, *et seq.*)

3. As a Salary Act it violates those provisions of Section 1 of Article III of the Constitution requiring that Judges—

(aa) Shall be paid a fixed compensation, and

(bb) Shall be paid a fixed compensation at stated times. (P. 88, *et seq.*)

4. As a Taxing Act it violates the Fifth Amendment, in that the classification of Judges, some subjected to the Act, and some exempted from the Act, solely because of the accidents of the time of their

respective appointments, is an arbitrary and unreasonable classification, wholly lacking in any difference or distinction, or basis for the classification, the Judges being, as, for instance, the Circuit Court of Appeals group of Judges, of equal rank and dignity, doing the same identical work, and, absent the offending classification, receiving the same stipulated compensation. (P. 104, *et seq.*)

(c) Assuming *Evans v. Gore* rule not to be in force, nevertheless Section 22 (a) of the 1936 Revenue Act is unconstitutional for the following reasons:

1. It would violate the rule implicit in Articles I, II and III of the Constitution, contemplating and providing for three separate departments of Government, and each department to be independent of the other departments, in that it, in effect, would subject the Judiciary to the taxing power of the Legislative Department, and the incident resulting coercive influence. (P. 39, *et seq.*)

2. As a Salary Act it would violate those provisions of Section 1 of Article III of the Constitution requiring that Judges—

(aa) Shall be paid a fixed compensation, and

(bb) Shall be paid a fixed compensation at stated times. (P. 88, *et seq.*)

3. As a Taxing Act it would violate the Fifth Amendment, in that the classification of Judges, some subjected to the Act, and some exempted from the Act, solely because of the accidents of the time of their respective appointments, is an arbitrary and unreasonable classification, wholly lacking in any dif-

ference or distinction, or basis for the classification, the Judges being, as, for instance, the Circuit Court of Appeals group of Judges, of equal rank and dignity, doing the same identical work, and, absent the offending classification, receiving the same stipulated compensation. (P. 103, *et seq.*)

4. It would accentuate the violation of the Fifth Amendment last afore-described, and would also create invidious distinctions, in that Judges of the same rank and dignity and doing the same identical work, would be receiving different compensation from the Government for their judicial services, all contrary to the fundamental conception that created the national Courts and the intent of the Makers of the Constitution, as well as the inherent inhibitions of the Fifth Amendment. (P. 100, *et seq.*)

(d) Assuming the *Evans v. Gore* rule not to be in effect, and that those provisions of Section 1 of Article III of the Constitution, requiring that Judges be paid a fixed compensation at stated times not to be violated by Section 22 (a) of the 1936 Revenue Act, nevertheless such Revenue Act is unconstitutional because—

1. As a Taxing Act it would violate the Fifth Amendment, in that the classification of Judges, some subjected to the Act, and some exempted from the Act, solely because of the accidents of the time of their respective appointments, is an arbitrary and unreasonable classification, wholly lacking in any difference or distinction, or basis for the classification, the Judges being, as, for instance, the Circuit Court of Appeals group of Judges, of equal rank and dignity, doing the same identical work, and, absent the offend-

ing classification, receiving the same stipulated compensation. (P. 104, *et seq.*)

Respectfully submitted,

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April 20, 1939.

pp. 3+4

SUPREME COURT OF THE UNITED STATES.

No. 810.—October Term, 1938.

George W. O'Malley, Individually and as Collector of Internal Revenue, Appellant,
vs.
Joseph W. Woodrough and Ella B. Woodrough.

On Appeal from the District Court of the United States for the District of Nebraska.

[May 22, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here under Section 2 of the Act of August 24, 1937 (50 Stat. 751), as a direct appeal from a judgment of a district court whose "decision was against the constitutionality" of an Act of Congress. The suit below, an action at law to recover a tax on income claimed to have been illegally exacted, was disposed of upon the pleadings and turned on the single question now before us, to wit: Is the provision of Section 22 of the Revenue Act of 1932 (47 Stat. 169, 178), re-enacted by Section 22(a) of the Revenue Act of 1936 (49 Stat. 1648, 1657), constitutional insofar as it included in the "gross income", on the basis of which taxes were to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932".

That this is the sole issue will emerge from a simple statement of the facts and of the governing legislation. Joseph W. Woodrough was appointed a United States circuit judge on April 12, 1933, and qualified as such on May 1, 1933. For the calendar year of 1936 a joint income tax return of Judge Woodrough and his wife disclosed his judicial salary of $12,500, but claimed it to be constitutionally immune from taxation. Since it was not included in "gross income" no tax was payable. Subsequently a deficiency of $631.60 was assessed on the basis of that item, which, with interest, was paid under protest. Claim for refund having been rejected, the present suit was brought, and judgment went against the Collector. The assessment of the present tax was technically under the Act of

1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of "judges of courts of the United States, taking office after June 6, 1932" which had been similarly incorporated in the Revenue Act of 1934 (48 Stat. 680, 686-687). Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his "gross income" must be judged on the basis of the validity of Section 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932 that gave notice to all judges therafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes. The fact that Judge Woodrough before he became a circuit judge and prior to June 6, 1932, had been a district judge is wholly irrelevant to the matter in issue. The two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar.

By means of Section 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of *Evans* v. *Gore*, 253 U. S. 245. That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the "gross income" from which the net income is to be computed, although merely part of a taxing measure of general, non-discriminatory application to all earners of incomes, is contrary to Article III, § 1 of the Constitution which provides that the "Compensation" of the "Judges" "shall not be diminished during their Continuance in Office." See also the separate opinion of Mr. Justice Field in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 604 *et seq.* To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views.[1] In doing so, he merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated.[2] Chief Justice Taney's vigorous views were shared by At-

[1] The letter was written on February 16, 1863, and will be found in 157 U. S. 701.

[2] ". . . I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it." 157 U. S. at 702.

torney General Hoar.[3] Thereafter, both the Treasury Department[4] and Congress[5] acted upon this construction of the Constitution. However, the meaning which *Evans* v. *Gore* imputed to the history which explains Article III, § 1 was contrary to the way in which it was read by other English-speaking courts.[6] The decision met wide and steadily growing disfavor from legal scholarship and professional opinion.[7] *Evans* v. *Goré* itself was rejected by most of the courts before whom the matter came after that decision.[8]

Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus

[3] 13 Op. A. G. 161; but see the opinion of Attorney General Palmer, 31 Op. A. G. 475.

[4] See Mr. Justice Field, concurring, in Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 588, 606-07.

[5] See Wayne *v.* United States, 26 Ct. Cl. 274; Act of July 28, 1892, c. 311, 27 Stat. 306.

[6] See Judgments in Cooper *v.* Commissioner of Income Tax, 4 Comm. L. R. 1304, construing Section 17 of the Queensland Constitution Act of 1867 which prohibited "any reduction or diminution of the salary of a Judge during his Term of office"; also, Judges *v.* Attorney-General for Saskachewan [1937] 2 D. L. R. 209, construing Section 96 of the British North America Act, 1867, that "The Salaries . . . of the Judges . . . shall be fixed and provided by the Parliament of Canada" in connection with the Income Tax Act, 1932, of Saskatchewan.

[7] See Clark, *Further Limitations Upon Federal Income Taxation*, 30 YALE L. J. 75; Corwin, *Constitutional Law in 1919-1920*, 15 AM. POL. SCI. REV. 635, 641-644; Fellman, *Diminution of Judicial Salaries*, 24 IOWA L. REV. 89; Lowndes, *Taxing Income of Federal Judiciary*, 19 VA. L. REV. 153; Powell, *Constitutional Law in 1919-1920*, 19 MICH. L. REV. 117-118; Powell, *The Sixteenth Amendment and Income from State Securities*, NATIONAL INCOME TAX MAGAZINE (July 1923) 5-6; 20 COL. L. REV. 794; 43 HARV. L. REV. 318; 20 ILL. L. REV. 376; 45 L. Q. REV. 291; 7 VA. L. REV. 69; 3 U. OF CHI. L. REV. 141.

[8] The cases, *pro* and *con*, are collected in the recent dissenting opinion by Chief Judge Bond of the Court of Appeals of Maryland in Gordy *v.* Dennis, 5 A. (2d) 69, 82. Particular attention should be called to the decision of the Supreme Court of South Africa, Krause *v.* Commissioner for Inland Revenue, [1929] So. Afr. R. (A. D.) 286, construing Section 100 of the South Africa Act, which had taken over the identical clause from Article III, Section 1, of our Constitution.

charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1.[9] To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by Section 3 of the Public Salary Tax Act of 1939, amended Section 22(a) so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932."[10] That Section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles* v. *Graham*, 268 U. S. 501, the latter cannot survive.

Judgment reversed.

Mr. Justiece McReynolds did not hear the argument in this cause and took no part in its consideration or decision.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[9] The provisions regarding security of salary ~~pass from~~ the Act of Settlement of 1700, 12 & 13 Will. III, c. 2, Sec. III, and the Act of 1760, 1 Geo. III, c. 23. See Holdsworth, *The Constitutional Position of the Judges*, 48 L. Q. Rev. 25; 2 Holdsworth, The History of English Law, 559-64; 6 id. 234, 514.

[10] Public No. 32, 76th Cong., 1st Sess., c. 59. Section 209 of the same statute, however, provides that "In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

SUPREME COURT OF THE UNITED STATES.

No. 810.—October Term, 1938.

George W. O'Malley, Individually and as Collector of Internal Revenue, Appellant,
vs.
Joseph W. Woodrough and Ella B. Woodrough.

On Appeal from the District Court of the United States for the District of Nebraska.

[May 22, 1939.]

Mr. Justice Butler, dissenting.

Concretely, the question is whether, by exacting from United States circuit judge Joseph W. Woodrough and his wife $631.60 in the form of income tax on his salary of $12,500 for 1936, the government diminished the compensation for his services theretofore fixed by Congress. That item excluded, they had no taxable income. The judge's monthly pay was $1041.66. The tax took at the monthly rate of $52.63.

The material details may be given briefly.

April 12, 1933, Judge Woodrough was appointed judge of the United States circuit court of appeals for the eighth circuit. He qualified May 1, 1933. Congress had by the Act of December 13, 1926,[1] enacted that "To each of the circuit judges the sum of $12,500 per year" shall be paid as compensation. Since May 1, 1933, appellee has received the specified pay. The Revenue Act of June 6, 1932, applicable only to taxable years beginning after December 31, 1931, contained a provision declaring that in the case of judges taking office after that date "the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such . . . judges are hereby amended accordingly."[2] The Revenue Act of 1934,[3] applicable only to taxable years beginning after December 31, 1933, and that of 1936,[4] applicable only to taxable years beginning after December 31, 1935, contain the same language as that just quoted from the Act of 1932.

Judge Woodrough and his wife made a joint income tax return for 1936; it disclosed his salary but claimed it was not subject to the tax. The commissioner held the item taxable and made a de-

[1] c. 6, 44 Stat. 919.
[2] § 22(a), c. 209, 47 Stat. 169.
[3] § 22(a), c. 277, 48 Stat. 680.
[4] § 22(a), c. 690, 49 Stat. 1648.

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ficiency assessment of $631.60. Plaintiffs paid under protest a filed claim for refund; it was denied. Claiming the tax that th were so compelled to pay diminished the judge's compensation a that therefore § 22(a) of the Act of 1936 violate § 1, Art. III, the Constitution, plaintiffs sued to recover the amount of the ta The collector moved to dismiss. The court held the Act unconsti tional, overruled the motion and, defendant having elected not plead further, gave plaintiffs judgment as prayed. Defenda appealed.[5]

Article III, § 1, declares: "The Judges, both of the Supreme a inferior Courts, shall hold their Offices during good Behaviour, a shall, at stated Times, receive for their Services, a Compensati which shall not be diminished during their Continuance in Offic

It safeguards the independence of the judiciary. The abu against which it was intended to be a barrier is included in the l of reasons for our Declaration of Independence. "The history the present King of Great Britain is a history of repeated injur and usurpations, all having in direct object the establishment of absolute Tyranny over these States . . . He has obstructed t Administration of Justice, by refusing his Assent to Laws for tablishing Judiciary powers.—He has made Judges dependent his Will alone, for the tenure of their offices, and the amount a payment of their salaries."

Alexander Hamilton, explaining the reasons for and the purp of § 1 of Art. III, said:

"The Executive not only dispenses the honors, but holds t sword of the community. The legislature not only commands t purse, but prescribes the rules by which the duties and rights every citizen are to be regulated. The judiciary, on the contra has no influence over either the sword or the purse; no directi either of the strength or of the wealth of the society; and can ta no active resolution whatever. It may truly be said to have neith *force* nor *will*, but merely judgment . . .

"This simple view of the matter . . . proves incontestab that the judiciary is beyond comparison the weakest of the th departments of power; that it can never attack with success eit of the other two; and that all possible care is requisite to enable to defend itself against their attacks . . . .

"The complete independence of the courts of justice is peculia essential in a limited Constitution. By a limited Constitution understand one which contains certain specified exceptions to t legislative authority; such, for instance, as that it shall pass

[5] Act of August 24, 1937, § 2, c. 754, 50 Stat. 752.

bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing . . . . ." (The Federalist, No. 78.)

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will* . . . . The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges, but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges." (The Federalist, No. 79.)

Mr. Justice Story declared that "Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery . . . ." 2 Story, § 1628. Chancellor Kent said: "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions." 1 Kent Com. 294.

The first judicial construction of the clause was by the circuit court of the District of Columbia in 1803 in the case of *United States* v. *More*.[6] The court was composed of Chief Justice Marshall, Chief Judge Kilty, and Circuit Judge Cranch. The opinion was written by Judge Cranch. The court sustained a demurrer to an indictment charging that More, a justice of the peace, under color of his office, exacted an illegal fee, 12 cents, for giving judg-

[6] The opinion is set forth in a footnote at p. 160 *et seq.*, 3 Cranch.

ment upon a warrant for a small debt. The issue was whether an Act of Congress abolishing fees of justices of the peace in the District of Columbia could affect those who accepted their commissions while the fees were legally annexed to the office. The court said: "The 3d article of the constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, *which shall not be diminished during their continuance in office.* The act of congress of 27th of February, 1801, which constitutes the office of justices of the peace . . . ascertains the compensation which they shall have for their services in holding their courts . . . This compensation is given in the form of fees, payable when the services are rendered . . . That his [the justice's] compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. . . . If his compensation has once been fixed by law, a subsequent law for diminishing that compensation (a *fortiori* for *abolishing* it) cannot affect that justice of the peace during his continuance in office; . . ."

The first attempt to tax compensation of federal judges was during the Civil War. Section 86 of the Act of July 1, 1862,[7] levied "on all salaries of officers, or payments to persons in the . . . service of the United States . . . when exceeding the rate of six hundred dollars per annum, a duty of three per centum on the excess above the said six hundred dollars", and directed disbursing officers to deduct and withhold the duty. These general provisions were construed by the revenue officers to comprehend the compensation of the President and the judges of the United States. By letter of February 16, 1863, Mr. Chief Justice Taney protested to the Secretary of the Treasury. In the course of his letter,[8] he said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even

[7] c. 119, 12 Stat. 472.

[8] Printed in 157 U. S. at p. 701.

the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments. . . .

"Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it."

The letter of the Chief Justice was not answered and, at his request, the Court, May 10, 1863, ordered the letter entered on its records. In 1869, the Secretary of the Treasury requested the opinion of Attorney General Ebenezer Rockwood Hoar as to the constitutionality of the Act construed to extend to judges' salaries. He rendered an opinion in substantial accord with the views expressed in Chief Justice Taney's protest. 13 Op. A. G. 161.[9] Accordingly, the tax on the compensation of the President and of judges was discontinued and the amounts theretofore collected from them were refunded—some through administrative channels; others through action of the court of claims and ensuing appropriations by Congress. See *Wayne* v. *United States*, 26 C. Cls. 274, 290; 27 Stat. 306.

In 1889, Mr. Justice Miller, a member of the Court since 1862, said:[9]

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[9] Miller on the Constitution of the United States, p. 247.

"The Constitution of the United States has placed seven limitations upon the general power [of taxation], and . . . som of them are implied. One of its provisions is that neither th President of the United States (Art. II, sec. 1, par. 6), nor a judg of the Supreme or inferior courts (Art. III, sec. 1), shall have hi salary diminished during the period for which he shall have bee elected, or during his continuance in office. It is very clear tha when Congress, during the late [Civil] war, levied an income tax and placed it as well upon the salaries of the President and th judges of the courts as those of other people, that it was a diminu tion of them to just that extent."

Although the Income Tax Act of 1894 said nothing about th compensation of the judges, Mr. Justice Field construed § 33[10] t tax that compensation and assigned that ground among others fo joining in the decision that the Act was unconstitutional. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 604-606. Mr. Justic Field, who was confirmed the day this Court ordered Chief Justic Taney's letter entered on its records, had taken his place upon th bench at the beginning of the following term. His opinion recite the facts of that incident and quoted extensively from the lette which was printed as an appendix to the volume of the reports co taining the opinions in the *Pollock* case. 157 U. S. 701. The Ju tice ended his discussion of the matter by stating his belief, base on information, that the opinion of Attorney General Hoar ha been followed ever since without question by the Treasury. An upon reargument of the cause, Attorney General Olney said in h brief: "There has never been a doubt since the opinion of Attorne General Hoar that the salaries of the President and judges we exempt."

The Revenue Acts of 1913[11] and 1916[12], being the first two aft adoption of the Sixteenth Amendment, expressly excluded fro gross income the compensation of judges then in office. But aft this country engaged in the World War, the Revenue Act of 191 approved February 24, 1919, defined gross income to include "in th case of the President . . . [and] the judges of the Supreme an inferior courts . . . the compensation received as such."[13] Th

[10] Section 33, 28 Stat. 557, in terms was much like § 86 of the Act of 186 it levied "on all salaries of officers or payments . . . to persons in t service of the United States, . . . when exceeding the rate of four tho sand dollars per annum, a tax of two per centum on the excess above the sa four thousand dollars" and made it the duty of disbursing officers to dedu and withhold the tax.

[11] § 2B, 38 Stat. 168.

[12] § 4, 39 Stat. 759.

[13] § 213(a), 40 Stat. 1062.

reports of the congressional committees having the measure in charge indicate that the Congress was in doubt as to the constitutional validity of that provision and intended to have the question decided by the courts.[14] The question was raised and presented for decision in *Evans* v. *Gore*, 253 U. S. 245. The Collector included the salary for 1918 of Judge Evans, appointed before enactment of the taxing statute, in gross income. Had it been excluded, he would have had no taxable income. He paid the tax and brought suit to recover the amount so exacted. The United States district court for the western district of Kentucky held him not entitled to recover. But, after argument by eminent counsel including the Solicitor General, this Court held that the clause declaring that compensation of judges "shall not be diminished during their continuance in office" prevents diminution by taxation and that it has been so construed in the actual practice of the government.

For the purpose of disclosing the reasons for and true meaning of the clause forbidding diminution of compensation of judges, the opinion of the Court, written by Mr. Justice Van Devanter, brought forward statements of Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Chief Justice Taney, Justice Field, Attorneys General Hoar and Olney and others.

Speaking for the Court, he said:

"With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office.' Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?"

" . . . The primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading

[14] H. Rept. No. 767, 65th Cong., 2d sess., p. 29; Sen. Rept. No. 617, 65th Cong., 3d sess., p. 6; 56 Cong. Rec., p. 10370.

principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

"Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished . . ."

"The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. . . .

"When we consider . . . what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forebear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. [Citing.] Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on se-

curing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all."

Mr. Justice Holmes wrote a dissenting opinion, in which Mr. Justice Brandeis joined. With that expression his opposition to the decision ended. Two years later, in *Gillespie* v. *Oklahoma*, 257 U. S. 501, writing for the Court, invalidating a state tax upon net income of a lessee from sales of his share of oil and gas received under leases of restricted Indian land, he said (p. 505): "In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source, the tax is *pro tanto* void; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; a rule lately illustrated by *Evans* v. *Gore* . . ." And in that case he relied on the truth, as put by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy." He quoted (p. 505) with approval from *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, the statement of the opinion (p. 530) that "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them."[15]

Miles v. *Graham*, (1925), 268 U. S. 501, held invalid § 213(a), Revenue Act of 1918, (condemned in *Evans* v. *Gore*) when applied to compensation of Judge Graham, appointed after its enactment. Mr. Justice Holmes joined in the decision. Mr. Justice Brandeis merely noted dissent.

In the course of the opinion, we said:

"Does the circumstance that defendant in error's appointment came after the taxing Act require a different view concerning his right to exemption? The answer depends upon the import of the word 'compensation' in the constitutional provision.

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[15] *Gillespie* v. Oklahoma is one of the decisions subjected to condemnatory comment in the concurring opinion in *Graves* v. New York ex rel. O'Keefe, No. 478, October Term, 1938. It is there said: "A succession of decisions [*Gillespie* v. Oklahoma is the first cited] thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."

At another place in that concurrence, the writer stated: "The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old

"The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

" . . . The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*.

"The taxing Act became a law [February 24, 1919] prior to the statute prescribing salaries for judges of the Court of Claims [approved February 25, 1919] but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of 'gross income', 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income', and to tax this as other salaries. This is forbidden by the Constitution.

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tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. . . . The arguments upon which McCulloch *v.* Maryland, 4 Wheat. 316, rested . . . have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in McCulloch *v.* Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' . . . The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits'. Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 223 (dissent)."

But, in the Gillespie case, Mr. Justice Holmes, speaking for the Court, had definitely applied the doctrine that the power to tax does involve the power to destroy.

In the Panhandle case neither the Court, nor indeed another justice dissenting, was impressed by "The power to tax is not the power to destroy while this Court sits." The statement is vague and may be read to imply a power that this Court never possessed. If taken to mean that we are empowered to regulate or to limit the exertion by Congress of its power of taxation, it justly may be regarded as hyperbole; if taken to mean that this Court has power to prevent imposition by Congress of taxes laid to discourage, to destroy, or to protect, then it is in the teeth of the law. See, e. g., Veazie Bank *v.* Fenno, 8 Wall. 533, 548; McCray *v.* United States, 195 U. S. 27, 53 *et seq.*; Magnano Co. *v.* Hamilton, 292 U. S. 40, 44 *et seq.*; Cincinnati Soap Co. *v.* United States, 301 U. S. 308.

"The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law."

In *O'Donoghue* v. *United States* (1933), 289 U. S. 516, we construed the Act of June 30, 1932[16] reducing the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." We there held that the supreme court and court of appeals of the District of Columbia were constitutional courts and therefore that the judges of those courts were excepted from the salary reduction. We cited the authorities, adopted the reasoning, and reaffirmed the conclusions on which rest the Court's judgments in *Evans* v. *Gore* and *Miles* v. *Graham*. And see *Booth* v. *United States*, 291 U. S. 339.

Evidently the Court intends to destroy the decision in *Evans* v. *Gore*. Without suggesting that there is any distinction between that case and *Miles* v. *Graham*, it declares that the latter "cannot survive." But the decision of today fails to deal with, much less to detract from the reasoning of those cases. The opinion would imply that the letter of Chief Justice Taney to the Secretary of the Treasury, and the separate opinion of Mr. Justice Field in the *Pollock* case were treated as having weight as judicial decisions. But nowhere has that ever been suggested. However, all who are familiar with our judicial history know that entitled to great respect are the reasoned conclusions of these eminent American jurists as to the true intent and meaning of the Constitution of the United States. And similarly worthy of attention are the opinions of the Attorneys General and other public officials following the reasoning of Chief Justice Taney.

Now the Court cites, as if entitled to prevail against those well-sustained opinions and the deliberate judgments of this Court, opposing views—if indeed upon examination they reasonably may be so deemed—of English speaking judges in foreign countries.

It refers, footnote 6, to the decision of the Privy Council in *Judges* v. *Attorney-General of Saskatchewan* (1937), 2 D. L. R. 209, construing income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legis-

[16] §§ 106, 107, 47 Stat. 401, 402.

lative enactments and subject to authoritative interpretation or change by the local or British Parliament. They shed no light upon the issue in this case.

The opinion claims no support from any state court decision. The one it cites, footnote 8, that of the Maryland Court of Appeals in *Gordy* v. *Dennis*, 5 A. 2d 69, held that under a clause in the Constitution of Maryland like that in Art. III, § 1, the compensation of state judges may not be taxed.

The opinion also cites, footnote 7, selected gainsaying writings of professors,—some are lawyers and some are not—but without specification of or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students.

The suggestion that, as citizens, judges are not immune from taxation begs the question here presented. The Constitution itself puts judges in a separate class, declaring that at stated times they shall receive for their services compensation which "shall not be diminished." And so their salaries are distinguished from income of others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved.

Admittedly the Court now repudiates its earlier decisions upon the point here in issue. The provision defining tenure and providing for undiminishable compensation was adopted with unusual accord. There has been unanimity of opinion that, because in comparison with the legislative and executive the judicial department is weak, its independence is essential to our system of government. These safeguards go far to insure that independence. And, from the beginning, statesmen and jurists have agreed that the clause forbids diminution of judges' compensation by any form of legislation. The clause in question is plain: no exception is expressed; none may be implied. Its unqualified command should be given effect.

For one convinced that the judgment now given is wrong, it is impossible to acquiesce or merely to note dissent. And so this opinion is written to indicate the grounds of opposition and to evidence regret that another landmark has been removed.

I am of opinion that the judgment of the district court should be affirmed.

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